Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

SSC CORP.,

Petitioner,

vs.

TOWN OF SMITHTOWN, TOWN BOARD OF THE TOWN OF SMITHTOWN, and PATRICK VECCHIO, Supervisor, TOWN OF SMITHTOWN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Did the Court below misapply this Court decision in *C. & A. Carbone v. Town of Clarkstown*, --- U.S. —, 114 S.Ct. 1677 (1994) by holding that a town may restrict the interstate movement of solid waste and evade the holding in *Carbone*, simply by prohibiting any company from providing residential solid waste collection services in the town, unless such company first signs a contract with the town, agreeing to dispose of residential solid waste at an in-state facility designated by the town, a provision which could not be imposed directly by law under the *Carbone* decision.

2. Did the Court below misapply the Market Participant doctrine when it accorded market participant status to a local government that had not directly entered the market for refuse collection or disposal services as a buyer, seller or employer, but which had instead contracted for these services from private parties whom it was also actively regulating?

3. Since the Market Participant doctrine has never been applied in cases involving natural resources, and since Congress has declared the energy and material content in solid waste to be a natural resource, was it improper for the Court below to apply the Market Participant doctrine to such a natural resource?

4. Does the ruling below commit error, by allowing a market regulator to restrict the interstate movement of solid waste; and if the ruling below is correct, does it threaten to cripple emerging national markets for energy and material resources extracted from solid waste?

LIST OF PARTIES

The parties are those set forth in the caption.

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner SSC Corp. prays that a writ of certiorari issue to review the judgment and order of the Second Circuit Court of Appeals.

OPINIONS BELOW

The decision of the Second Circuit Court of Appeals is reported at 66 F.3d 502 (2d Cir. 1995) and is reproduced in Appendix A at 1a *et seq.* The order of the District Court is unreported and is contained in Appendix B at 36a *et seq.*

STATEMENT OF JURISDICTION

The decision of the Court of Appeals invalidating one part of the Smithtown ordinance on Commerce Clause grounds but upholding the "improvement contract" issued pursuant to that ordinance was rendered on September 19, 1995 (Appendix A at 1a-35a).

This Court's jurisdiction to review this case upon certiorari is conferred by 28 U.S.C. § 1254, since the Court of Appeals upheld, in a final judgment, a local town ordinance and certain provisions of a contract issued under that ordinance against a challenge under the dormant Commerce Clause of the Constitution, Art. I, Sect. 8. cl. 3. Federal jurisdiction was originally invoked in the district court under 42 U.S.C. §1983.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

SMITHTOWN CODE § 177-17(B) (1994):

> No person authorized to collect or transport acceptable waste within the Town of Smithtown shall dispose of

> acceptable waste generated within the Town of Smithtown except at a solid waste management facility designated by the Town Board pursuant to this section.

SMITHTOWN CODE § 177-4 (1994).

> Only solid waste acceptable at specific town-designated facilities, including but not limited to garbage, trash, rubbish, refuse, construction and demolition materials and yard waste that are normally disposed of by and collected from residential, commercial, industrial, governmental, community facilities or institutional establishments, except that "acceptable wastes" shall not include unacceptable waste and recyclables.

U.S. CONSTITUTION, ARTICLE I, SECT. 8, CL. 3:

> Congress shall have Power . . .
>
> To Regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

STATEMENT OF THE CASE

Preliminary Statement

This case involves an important application of this Court's recent decision in *C. & A. Carbone v. Town of Clarkstown*, --- U.S. ---, 114 S.Ct. 1677 (1994). That decision prohibited governmental units from enacting "flow control" laws that required solid waste (a natural resource that might otherwise be taken to another jurisdiction) to be directed to a specific processing facility whose "tipping fees" benefitted the government that passed the law in question. While the Court of Appeals below paid lip service to the *Carbone* decision and struck down a local law (enacted by Smithtown,

N.Y.) that mirrored the law condemned in *Carbone*, it allowed Smithtown to evade the requirements of *Carbone* by simply requiring any solid waste collector to enter into a contract with the Town and to agree to conditions specifically prohibited by this Court in *Carbone*.

The Court below arrived at this strange result -- which allowed towns in Smithtown's position to do indirectly (through a contract provision) what they could not do directly (by enacting a prohibited ordinance) -- through a misreading and misapplication of this Court's market participant doctrine. Review is necessary to correct this serious error in Commerce Clause analysis. Review is also necessary because there is a conflict between the circuits concerning the application of the market participant doctrine to provisions in a municipal solid waste collection contract, which prohibit the interstate disposal of solid waste.[1]

The lower court misapplied the market participant doctrine in two respects. First, it accorded market participant status to a local government that had established an exclusive monopoly with respect to the market at issue, namely solid waste collection and disposal services. Thus its demand for bids from private collectors for the privilege of collecting waste and its letting of contracts to them was part of a regulation process dealing with the collection and disposal of garbage generally. The letting of collection and disposal

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[1] As the Court below stated, petitioner "directs our attention to *Waste Recycling v. Southeast Alabama Solid Waste Disposal Authority*, 814 F. Supp. 1566, 1570, 1575-77 (M.D. Ala. 1993) *aff'd sub nom. United States v. Bankster*, 23 F.3d 41 (11th Cir. 1994), where the court rejected application of the market participant doctrine to a garbage collection and disposal contract much like the one between Smithtown and SSC . . . We decline to adopt the reasoning of the *Waste Recycling* court." See 29a.

contracts did not constitute the town's participation in a discrete local market, which private parties could enter or leave at will, on the same basis as the Town did.

Second, the Court of Appeals failed to recognize that this Court has set limits on the market participant doctrine, which bars the application of that doctrine in this case.

The market participant doctrine has been applied by this Court only in instances where a state directly acts as a buyer or seller of goods, or as an employer, and it effects the market only through the laws of supply and demand. *Hughes v. Alexandria Scrap*, 426 U.S. 794 (1976); *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980); *White v. Massachusetts Council of Construction Employees*, 460 U.S. 204 (1983). No such conduct is evident in the record below.

The market participant doctrine, moreover, has no application in cases involving a natural resource. This fact is significant, since in *Carbone, supra*, this Court clearly considered solid waste to be a natural resource. It declined to apply the market participant doctrine in that case, and struck down a flow control law that "hoarded a local resource[.]" *Id.* 114 S. Ct. 1682, 1683.[2] Finally, even

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[2] An important exception to the market participant doctrine exists where the state is dealing with a natural resource. *Reeves v. Stake*, 447 U.S. 429, at 443-44. The Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C.A. §6901 *et seq.*, the principal federal statute regulating the management of solid waste, codifies solid waste as a natural resource, finding at 42 U.S.C.A. §6901(c) and §6901(d), that energy and raw material in solid waste, "can reduce the dependence of the United States on foreign resources" and that "solid waste represents a potential source of solid fuel, oil or gas that can be converted into energy." The 11th Circuit echoed this reasoning in *GSW, Inc. v. Long County*, 999 F.2d 1508 (11 Cir. 1993), holding that "[w]aste disposal

if a town is entitled to market participant status, the decision in *South Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82 (1984), holds that the local government may not regulate conduct in a "downstream market." Yet this is precisely what the Town contractual flow control provision does, when it prohibits out-of-state disposal facilities from marketing their services in interstate commerce.

The decision below seriously erodes the protections of the Commerce Clause, and promotes the type of economic balkanization the Commerce Clause was intended to prevent.[3] It is respectfully submitted that the court below applied the market participant doctrine in a manner that does a grave injustice to the prior rulings of this Court.

Statement of Facts

This case arose when Respondent Town of Smithtown (the Town) threatened to sue Petitioner, SSC Corp., for more than $1,000,000.00 based on alleged violations of a "flow control" provision in a residential refuse collection contract (the Contract) between the Town and SSC. Based on these alleged breaches of

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service is more comparable to a natural resource[.]" *Id.*, at 1516.

[3] See e.g., concurring opinion of Justice O'Connor in *Carbone:*

> Over 20 states have enacted statutes authorizing flow control laws. If the localities in these States impose the type of restriction on the movement of waste that Clarkstown has adopted, the free movement of solid waste in the stream of commerce will be severely impaired. Indeed, pervasive flow control would result in the type of balkanization the Clause is primarily intended to prevent. 114 S.Ct. at 1690.

contract, as Well as alleged violations of the Town's flow control ordinance, the Town unilaterally withheld $761,111.46 in payments due SSC Corp. under the Contract. SSC Corp. has repeatedly denied violating the flow control provisions of the contract or the ordinance.

Since the withholding of funds by the Town exposed SSC Corp. to financial ruin, and since the alleged violations of the Town's flow control ordinance exposed the company to significant civil and criminal penalties, SSC took action in federal court seeking a declaration under 42 U.S.C. § 1983, that the flow control provisions in the Contract, and in the Smithtown Town Code, constituted *per se* violations of the Commerce Clause. The district court agreed, and granted summary judgment in favor of SSC Corp.[4] (36a *et seq.*)

The Town appealed to the Second Circuit, and on September 19, 1995, the Circuit Court entered judgment affirming in part, and reversing in part, the judgment of the district court. The Second Circuit agreed with the district court, finding that the Town's flow control ordinance violated the Commerce Clause. "Carbone compels us to find that Smithtown flow control ordinance facially discriminates against interstate commerce because it directs all town waste to a single local disposal facility, to the exclusion of both in state and out-of-state competitors." (26a). But the court also disagreed with the district court, holding that because the Town was a "market participant," it could enforce a contractual flow control provision that it could not have enforced in the form of an ordinance.

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[4] Section 177-102 of the Smithtown Town Code, which was invalidated by both the District and Circuit Court, provided that any person violating the Town's flow control law "shall be guilty of an unclassified misdemeanor and shall be liable to a fine of not more than five thousand dollars ($5,000.) or imprisonment for not more than sixty (60) days, or both."

Contractual Flow Control In the Town of Smithtown

The Contract authorizes SSC Corp. to provide solid waste collection services in seven of ten residential refuse collection districts created and administered by the Town.[5]

Under the Contract, the Town reserved the right to designate sites for the disposal of solid waste collected by SSC Corp. Section 1.04 A.1 of the Contract thus provides that: "All residential solid waste collected by the Contractor shall be transported to and disposed of at solid waste management facilities which are or may be designated by the Town of Smithtown during the term of this Contract." The Contract designates a privately-owned incinerator in the neighboring township of Huntington (New York), as the exclusive instate disposal site for refuse collected under the Contract.

The contractual flow control scheme advanced by the Town is feasible only because the Town dominates the local market for residential refuse collection service. No private company may provide refuse collection service in the Town, without first obtaining a permit from the Town; and no company may successfully bid on a residential refuse collection contract, unless it agrees to be bound by the contractual flow control provisions mandated by the Town. No private party could control a market so completely.

Impact on Interstate Commerce

The parties have stipulated that SSC Corp. has available to it out-of-state landfills which accept solid

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[5] Refuse collection districts are authorized under Article 12 and 12a of the New York State Town Law. These districts may contract for solid waste collection services that benefit persons and property within the district, and may impose and collect *ad valorem* tax assessments to recoup the cost of operating and maintaining the district.

waste for disposal at rates which are lower than the $65.00 per ton tipping fee imposed by the privately owned local incinerator favored by the Town in the Contract. The parties have further stipulated, that the flow control provisions in the Contract, prevent SSC Corp. from disposing of locally generated, residential solid waste outside the State of New York.

The record below also establishes that in 1992, nearly four million tons of solid waste generated in New York State, were shipped out-of-state for disposal, to states including Massachusetts, Connecticut, Pennsylvania, Ohio, Georgia, Arkansas, Illinois, Indiana, Kentucky, N. Carolina,, West Virginia, Virginia, Texas and Colorado.[6] On the national level, the record documents that 19 million tons of solid waste moved in interstate commerce during 1992, representing approximately 9% of the estimated 200.6 million tons of solid waste generated in the United States that year. These statistics confirm the holdings in *C & A Carbone v. Town of Clarkstown*, -- U.S.--, 114 S.Ct. 1677 (1994) and *Philadelphia v. New Jersey*, 437 U.S. 617 (1978), which recognize that solid waste is an article of commerce, fully deserving of protection under the Commerce Clause.

The Decisions Below

The district court granted summary judgment to petitioner from the bench, and entered a Judgement and Order which appears as Appendix B (36a *et seq*). On appeal, the Second Circuit came to the astonishing conclusion that the Town's flow control ordinance was unlawful under *Carbone*, but that the Town's contractual

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[6] In 1994, over 4,119,448 tons of solid waste were exported for disposal from New York State, an increase of 211,913 tons, or 5.4% over the 3,907.535 tone exported during 1993. *Where Will the Garbage Go 1995*, Report of the New York State Assembly Legislative Commission on Solid Waste Management (April 1995), page 19.

flow control program was lawful, because the Town was acting as a market participant. The decision of the Second Circuit appears as Appendix A (1a-35a).

The decision below relied heavily on the holding in *White v. Massachusetts Council of Construction Employers*, 460 U.S. 204 (1983). In *White*, the Supreme Court held that the City of Boston did not violate the Commerce Clause when it imposed local hiring requirements in city-funded construction contracts. The *White* Court reasoned that since the city had effectively entered the market as an employer ("[everyone affected by the order is, in a substantial if informal sense, "working for the city." *id*, 460 U.S. at 211, the City was could act like any private merchant, to impose contractual provisions which burdened interstate commerce. The Second Circuit thus held that "if Boston could require contractors for city-funded projects to hire a certain percentage of city residents . . . Smithtown can require SSC to use local incinerating services as well." 27a. The Second Circuit then reversed that portion of the district court decision which found contractual flow control by the Town to be violative of the dormant Commerce Clause.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW PERMITS AN OBVIOUS SUBTERFUGE TO AVOID THIS COURT'S HOLDING IN *CARBONE* AND MUST BE REVERSED

This Court established an important principle in *Carbone* with respect to the hoarding of solid waste resources by a local government. In *Carbone*, this Court struck down a local solid waste flow control law as a *per se* violation of the Commerce Clause. "We consider a so-called flow control ordinance, which requires all solid waste to be processed at a designated transfer station before leaving the municipality", *Id.*, 114 S. Ct. at 1680. Writing for the majority, Justice Kennedy concluded that

because the ordinance attains its goal "by depriving competitors, including out-of-state firms, of access to a local market, we hold that the flow control ordinance violates the Commerce Clause." *Id.* This Court reached this decision, while acknowledging that "state and local governments are expending significant resources to develop trash control systems that are efficient, lawful, and protective of the environment." *Id.*, at 1680.

The essential vice of flow control is that it drives up the cost of solid waste disposal by denying out-of-state landfills access to local markets. As Justice Kennedy explained:

> By requiring Carbone to send the nonrecyclable portion of this waste to the Route 303 transfer station at an additional cost, the flow control ordinance drives up the cost for out-of-state interests to dispose of their solid waste. Furthermore, even as to waste originating in Clarkstown, the ordinance prevents everyone except the favored local operator from performing the initial processing step. The ordinance thus deprives out-of-state businesses of access to a local market. These economic effects are more than enough to bring the Clarkstown ordinance within the purview of the Commerce Clause.

114 S.Ct. at 1681.

Justice Kennedy continued:

> With respect to this stream of commerce, the flow control ordinance discriminates, for it allows only the favored operator to process waste that is within the limits of the town. . . . The essential vice in laws of this sort is that they bar the import of the processing service. Out-of-state [companies] are deprived of access to local demand for their services. Put another way, the offending local laws hoard a local resource--be it

> meat, shrimp, or milk--for the benefit of local businesses that treat it. The flow control ordinance has the same design and effect. It hoards solid waste, and the demand to get rid of it, for the benefit of the preferred processing facility.

114 S.Ct. at 1682-3.

The Second Circuit properly held that one aspect of the Smithtown ordinance which enforces the flow control requirements though threat of criminal sanctions, was barred by *Carbone*. But it immediately undermined that holding by deciding that the Town could achieve the same result by imposing a contract provision on any waste collector which provision would achieve the same effect -- namely the hoarding of "solid waste, and the demand to get rid of it, for the benefit of the preferred processing facility." The decision below allows every vice condemned by the *Carbone* decision, the import of of-of-state processing service is barred; "out-of-state [companies] are deprived of access to local demand for their services;" and a local resource is hoarded "for the benefit of local businesses that treat it."

This Court has never allowed its decisions to be so casually disregarded by such an obvious device, in particular through the imposition of contractual provisions that would violate the Constitution if imposed directly by law or ordinance. This rule rests upon the doctrine of "unconstitutional conditions," see *e.g. Perry v. Sindermann*, 408 U.S. 593 (1972)(unconstitutional restriction on First Amendment rights cannot be imposed as a condition of public employment).

See also *Dolan v. City of Tigard*, 114 S.Ct. 2309, 2316 (1994):

> Under the well-settled doctrine of unconstitutional conditions, the government may not require a person to give up a constitutional right -- here the right to receive just

> compensation when property is taken for a public use -- in exchange for a discretionary benefit conferred by the government where the property sought has little or no relationship to the benefit. See *Perry v. Sindermann*, 408 U.S. 593 ... (1972), *Pickering v. Board of Ed. of Township High School Dist.*, 391 U.S. 563, 568, ...(1968).

The Town of Smithtown imposed an improper and unconstitutional condition on companies bidding on waste collection and disposal services in the Town -- namely the right to seek out cheaper out-of-state processors.[7] This Court prohibited such requirements directly and must also establish any indirect impositions of such requirements, through contracts such as that involved in the instant case.

II.

THE COURT SHOULD DECIDE WHETHER THE MARKET PARTICIPANT DOCTRINE WAS MISAPPLIED BY THE LOWER COURT, WHEN IT ACCORDED MARKET PARTICIPANT STATUS TO A LOCAL GOVERNMENT THAT WAS ACTING AS A MARKET REGULATOR

A. The Market Participant Doctrine

This Court has developed an exception to the broad reach of the Commerce Clause to address situations where a state is directly acting as a participant in the market, rather than as a regulator. *Hughes v.*

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[7] There are some conditions that a Town might establish that would be rationally related to the object of the disposal contract. For example, if a Town required that solid waste must be disposed of only at licensed facilities. However, when the disposal requirements specifies that only in-state facilities qualify as a disposal site (thereby excluding even licensed out-of-state facilities from consideration, the Commerce Clause is offended.

Alexandria Scrap, 426 U.S. 794 (1976); *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980); *White v. Massachusetts Council of Construction Employees*, 460 U.S. 204 (1983); *South Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82 (1984). This exception is known as the market participant doctrine.

Two reasons underlie the market-participant doctrine. First, there is "the long recognized right of a trader or manufacturer, engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." *White v. Massachusetts Council*, 460 U.S. at 207 n. 3, quoting *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919). "Evenhandedness suggests that, when acting as proprietors, States should . . . share existing freedoms from federal constraints, including the inherent limits of the Commerce Clause." *Reeves, Inc. v. Stake*, 447 U.S. at 439 (citations omitted). Second, "the Commerce Clause responds principally to state taxes and regulatory measures impeding free private trade in the national marketplace." *Id.* at 436-37 (citation omitted). "There is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market." *Id.*

In deciding cases which assert "market participation" as a basis for Commerce Clause immunity, the critical question for the Court is whether the challenged governmental conduct is more analogous to the business activities of traders and manufacturers, in which case the local government should be allowed to pursue its own economic interest and determine those with whom it will deal in the private market -- or is more analogous to an effort to regulate activities among such parties in the private market -- in which case the local government must be subject to Commerce Clause scrutiny. It is respectfully submitted, that the Court below misapplied this standard.

B. The Town As Market Regulator

New York law makes clear that a town is fulfilling a governmental duty when it provides garbage collection or disposal services. *USA Recycling, Inc. v. Town of Babylon*, 64 USLW 2186, 1995 WL 553843 (2nd Cir. N.Y., September 19, 1995). New York municipalities have a duty to ensure proper collection and disposal of trash for the well-being and health of the community. *Nehbras v. Incorporated Village of Lloyd Harbor*, 2 N.Y.2d 190, 194-95, 159 N.Y.S.2d 145, 140 N.E.2d 241 (1957); 1979 N.Y.Op.Att'y Gen. (Informal) 237 ("Generally, the removal of garbage is an affirmative duty properly delegated to and imposed upon municipalities.").

To fulfill this duty, a municipality may perform the function of removal directly through its own department; or it may have it performed under a public contract; or it may require a license to be obtained by persons or firms authorized and qualified to perform that function. It is for the municipality, within reasonable bounds, to determine how solid waste will be collected and removed, or rendered harmless. *P. & A. Carting Co. v. City of New York*, 7 Misc.2d 815, 817, 158 N.Y.S.2d 296 (Sup.Ct., Special Term, N.Y.County 1956). This responsibility is carried out through regulation.

In this case, Smithtown performs its regulatory duty with respect to solid waste management, through: (a) a permit program that prohibits private parties from offering refuse collection services, without prior approval from the Town, in the form of a permit; (b) by creating and administering a town wide system of residential refuse collection districts, which provide that only one contractor may provide service to a given district; (c) by establishing civil and criminal penalties for haulers who collect garbage without a license; and most importantly, (d) by dictating that no private party may bid on a residential refuse collection contract unless it agrees to the terms mandated by the Town.

These are indications of market regulation, not market participation, since no private actor could control a market so completely. The Court below was therefore in error when it determined that the Town was a market participant and exempt from scrutiny under the Commerce Clause.[8]

III.

THIS COURT HAS SET LIMITS ON THE APPLICATION OF THE MARKET PARTICIPANT DOCTRINE, WHICH LIMIT ITS APPLICATION IN THIS CASE, AND WHICH RENDER THE DECISION BY THE SECOND CIRCUIT IMPROPER AND CONTRARY TO LAW.

A. Limits on the Market Participant Doctrine

This Court has limited the market participant doctrine to cases where the state acts directly as a buyer of goods (*Hughes v. Alexander Scrap*, 426 U.S. 794 (1976)), a seller of goods (*Reeves v. Stake*, 447 U.S. 429 (1980)) of goods, or as an employer (*White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204 (1984)). The doctrine has never been applied to a case such as this one, where the state did not directly enter the market as a buyer, seller or employer.

The Supreme Court first articulated the market participant doctrine in *Hughes v. Alexandria Scrap Corp.*

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[8] Petitioner does not question the central role of local government in the regulation of solid waste. *California Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306 (1905); *Gardner v. Michigan*, 199 U.S. 325 (1905). It merely asserts that this Court has never suggested that local government may perform its traditional oversight function without regard to the Commerce Clause.

426 U.S. 794 (1976), which involved Maryland's statutory program to pay bounties for the destruction of abandoned vehicles titled in Maryland. A Commerce Clause dispute arose because out-of-state scrap processors were required to provide more extensive documentation to show that they were entitled to the bounty.

The effect of the Maryland statute was to offer a subsidy only to scrap processors located within the State. See 426 U.S., at 803, n. 13. The Court held that a State, free from Commerce Clause scrutiny, may enter "the market as a purchaser, in effect, of a potential article of interstate commerce" and "restric[t] its trade to its own citizens or businesses within the State." Id., at 808, 96 S.Ct., at 2497. *Alexandria Scrap* allows a State to avoid Commerce Clause scrutiny when it directly acts as a buyer of goods. Id. at 806, 96 S.Ct. at 2496.

The Court next applied the market participant doctrine in *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980), a case challenging South Dakota's practice of limiting the sale of cement produced at a state-owned plant to state residents in times of shortage. The Court reaffirmed its holding in *Hughes, supra*., explaining that "[t]here is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market." *Reeves*, 447 U.S. at 437, 100 S.Ct. at 2277. In *Reeves*, South Dakota refused to sell cement to out-of-state consumers until the orders of all in-state customers were filled. The Court held that the Commerce Clause is not implicated when a State prefers its own residents when it acts as a seller of state-produced goods. But there was no indication that the State had first established a monopoly in the manufacture of cement before it imposed its restrictions on to whom it would sell.

In 1983, the Court extended the market participant doctrine in *White v. Massachusetts Council of Construction Employees*, 460 U.S. 204 (1983), to permit a city to require that at least half of the workforce used to

complete city-funded construction projects must be comprised of city residents. Id. at 208-09, 103 S.Ct. at 1045. The fact that the city was in a substantial if informal sense directly acting as an employer, id., n.7, was "crucial" to the market-participant analysis in *White. United Building and Construction Trades Council v. Mayor of Camden*, 465 U.S. 208 (1984). But once again the City did not establish any type of monopoly in construction services before it imposed its condition on whom it would employ. Construction companies were still free to bid on other construction projects and to hire out-of-state laborers to work on those projects.

Here by contrast, the Town of Smithtown first declared its total control -- a monopoly -- over residential solid waste collection and disposal services. No other company could compete in that market without dealing and contracting with the Town. And the conditions established by those contracts would be illegal if imposed directly by law.

This Court has limited the market participant doctrine only to instances where a state acts directly as a buyer or seller of goods, or as an employer. Contrary to the decision below, the market participant doctrine has never been applied where as here, the state is merely a consumer of services which are performed by an independent private party.[9]

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[9] Indeed, if the consumption of services directly performed by private parties entitled a municipality to market participant status, a town could claim to be a market participant in the legal services market by hiring outside counsel; or, a town could claim to be a market participant in telecommunications, by relying on the services of the local private telephone company. Because these results would be absurd, it is clear that the market participant doctrine has no application when a municipality relies on the private sector to perform public services.

B. The Market Participant Doctrine Does Not Apply to Natural Resources

An important exception to the market participant doctrine exists where the state is dealing with a natural resource. *Reeves v. Stake*, 447 U.S. 429, at 443-44. A state is not permitted to hoard a natural resource within its borders for the benefit of its citizens. *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923) (striking down West Virginia statute giving preference to domestic consumers of natural gas over out-of-state users); *West v. Kansas Natural Gas*, 221 U.S. 229 (1911) (prohibiting Oklahoma from barring out-of-state transportation of natural gas). Solid waste qualifies as a natural resource, because of its energy and material content.

This fact was recognized by the United States Congress when it enacted the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C.A. §6901 *et seq.*, the principal federal statute regulating the management of solid waste. RCRA recognizes solid waste as a natural resource, at 42 U.S.C.A. §6901(c) and §6901(d), which provides:

> (c) **Materials**
>
> The Congress finds with respect to materials, that --
>
> (1) millions of tons of recoverable material which could be used are needlessly buried each year;
>
> (2) methods are available to separate usable materials from solid waste; and
>
> (3) the recovery and conservation of such materials can reduce the dependence of the United States on foreign resources and reduce the deficit in its balance of payments.
>
> (d) **Energy**
>
> The Congress finds with respect to energy, that --

> (1) solid waste represents a potential source of solid fuel, oil, or gas that can be converted into energy;
>
> (2) the need exists to develop alternative energy sources for public and private consumption in order to reduce our dependence on such sources as petroleum products, natural gas, nuclear and hydroelectric generation; and
>
> (3) technology exists to produce usable energy from solid waste."

As RCRA suggests, there is a national market for the energy and material that can be recovered or reclaimed from solid waste. This market is placed in great peril by the decision below, particularly if it is a harbinger of similar decisions yet to come.

The interstate market for energy derived from solid waste, is recognized by the United States Department of Energy and the Federal Trade Commission. On January 24, 1995, the Federal Energy Regulatory Commission (an arm of the Department of Energy), published a notice describing the efforts by a company based in Maryland, to cross state lines and build a refuse-fired power plant in Michigan. 60 Fed. Reg. 4617, 4618. In June of 1994, the Department of Energy published a solicitation for proposals demonstrating projects fueled by waste materials. The notice provided that acceptable demonstration projects would use one or more of the following fuels: "landfill debris and landfill gas; logging residues; agricultural crops and waste;. . . urban, forest, and forest product wood wastes; municipal solid waste; animal wastes and food processing wastes." 59 Fed. Reg. 33284 (June 28, 1994). The Federal Trade Commission, in a rule amending the national fuel octane certification program, recognized waste-derived fuels such as methanol, finding that:

> The majority of methanol produced in the U.S. is from natural gas resources, but it can also be produced from coal, residual oil, and biomass. . . .

> Biomass is a renewable, virtually inexhaustible domestic resource that can be used to produce methanol and ethanol. Corn is a major biomass feedstock being used today. Other biomass sources currently being used, or subject to research as potential feedstocks, including crop residues, forage (grass) crops, wood resources (forest residues and short rotation wood energy crops), and the cellulosic components of municipal solid waste. 58 Fed. Reg. 41356, 41358 (August 3, 1993).

The interstate market for raw material extracted from solid waste is also well recognized, and beginning to mature. In fact, on October 17, 1995, the Chicago Board of Trade commenced trading in "recyclable trash."[10]

It is difficult to provide accurate estimates of the amount of materials recycled in the United States. See, *Facing America's Trash*, a report of the Congress of the United States, Office of Technology Assessment, OTA-O-424, page 135. However, the New York State

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[10] This remarkable development was reported by the Gannett newspaper chain, under the headline "An exchange opens for trading recyclable trash." The article beneath read: "Chicago -- Forget junk bonds. Now they're trading junk. A national marketplace for buying and selling recyclable trash opened yesterday at the Chicago Board of Trade. The first transaction: Weyerhauser Co. bought 100 tons of old newspaper from Oswego County, N.Y." *The Reporter Dispatch*, Gannett Suburban Newspapers, October 18, 1995, Section E, page 1. The *Economist* (October 28, 1995) reported the same event under the headline: "Garbage in, business out." The *New York Times* observed (October 15, 1995) that the so-called trash exchange "would allow commodity investors to speculate on movements in their prices just like corn, oil and Treasury bonds and help users of the materials create financial hedges against price swings."

Legislative Commission on Solid Waste Management reported that in New York State, 2,974,559.4 tons of material were "marketed for recycling" in 1993; and that this material included, old newsprint, yard waste, scrap metal, glass, plastic, corrugated cardboard, wood waste, office paper, tin cans, textiles, aluminum, lead acid batteries, phone books, magazines and tires. *Where Will the Garbage Go?, supra.*, N5, at pages 6-9.

Natural resources, like all articles of commerce, including solid waste, are entitled to protection under the Commerce Clause. *Sporhase v. Nebraska*, 458 U.S. 941 (1982). See also: *Toomer v. Witsell*, 334 U.S. 385, 401 (1948); *Douglas v. Seacoast Products*, 431 U.S. 265 (1977); and *Takahashi v. Fish and Game Commission*, 334 U.S. 410 (1948); see also *Hughes v. Oklahoma*, 441 U.S. 322 (1979). The market participant doctrine has never been applied in a natural resource case, and because solid waste should be treated as a natural resource, it was error for the Court below to apply the market participant doctrine in this case.

C. The Market Participant Doctrine Does Not Permit Regulation of Down Stream Markets.

In *South Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82 (1984), this Court crafted an important limitation to the market participant doctrine, holding that "[t]he limit of the market-participant doctrine must be that it allows a State to impose burdens on commerce within the market in which it is a participant, but allows it to go no further. The State may not impose conditions, whether by statute, regulation, or contract, that have a substantial regulatory effect outside of that particular market" *Id.*, 467 U.S. at 97.

In *Wunnicke*, the Court declared as violative of the Commerce Clause a contractual requirement that timber taken from state lands be processed within the state prior to export.[11] While "Alaska . . . participates in

the timber market," the plurality wrote, it also "imposes conditions downstream in the timber processing market" in that the timber buyer "is not free to take the timber out of state prior to processing." 467 U.S. at 95. The plurality explained that the market participant doctrine "is not carte blanche to impose any conditions that the State has the economic power to dictate, and does not validate any requirement merely because the State imposes it upon someone with whom it is in contractual privity." *Id.* at 97. This Court cautioned that any broader reading of the doctrine, "has the potential of swallowing up the rule[.] *Id.*

Wunnicke recognizes that there are "limits on a state or local governments ability to impose restrictions that reach beyond the immediate parties with which the government transacts business" (*White*, 460 U.S. at n.7), and that the Commerce Clause does not permit a state to impose contractual "restrictions on the disposition" of material that has "*come to rest in private hands* (emphasis supplied)." Id., 467 U.S. at 98. It is precisely this type of restriction that the Court below validated when it approved the contractual flow control program advanced by the Town of Smithtown.

Not only does the Town's contractual flow control provision restrict the disposition of material in private hands, it also prevents out-of-state recyclers, energy production facilities, and less costly disposal sites from competing in interstate commerce for solid waste generated in the Town of Smithtown. The Town's

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[11] The contractual "flow control" provision in *Wunnicke* is very much like the contractual "flow control" provision presently at issue. "Pursuant to an Alaskan statute, the Alaska Department of Natural Resources published a notice that it would sell certain timber from state lands under a contract requiring primary manufacture (partial processing) of the timber within Alaska before the successful bidder could ship it outside of the State (emphasis supplied)" Id., 467 U.S., at 82.

contractual flow control program therefore has a direct impact on commerce occurring wholly outside the Town of Smithtown. In *Healy v. Beer*, 491 U.S. 324 (1989), this Court noted that "a state law that has the practical effect of regulating commerce occurring wholly outside that States borders is invalid under the Commerce Clause." *Id.* at 322. The Court later elaborated, stating that: [t]he critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State. *Id.* at 336.

The contractual flow control provision advanced by the Town, restricts economic conduct in other states. The Town imposes these restrictions, as part of a local program to regulate the residential refuse collection market. These are the actions of a market regulator, not a market participant. The court below therefore erred when it validated contractual flow control under the market participant doctrine.

IV.

THE DECISION BELOW CONFLICTS WITH A DECISION IN THE ELEVENTH CIRCUIT

The decision below conflicts with a decision in the Eleventh Circuit in *Waste Recycling, Inc. v. Southwest Alabama Solid Waste Disposal Authority*, 814 F.Supp 1566 (M.D. Ala. 1993) *aff'd sub nom United States v. Bankster*, 29 F.3d 41 (11th Cir. 1994). In *Waste Recycling*, three private carting companies challenged a series of municipal contracts and flow control ordinances which mandated that solid waste collected within the subject municipalities be delivered to a public waste disposal site owned and operated by the Alabama Solid Waste Disposal Authority. Rejecting a market participant defense, the Court "easily" found the flow control ordinances and the user contracts invalid under the Commerce Clause, holding:

> The court need not search deeply to find compelling evidence that the three cities' claim to the [market participant] doctrine is meritless -- that is, that the cities are not purchasers as was Maryland in *Alexandria Scrap*, or sellers as was South Dakota in *Reeves, Inc. v. Stake*, or bona fide interest holders in construction projects as was Boston in *White v. Massachusetts Council*. The user contracts -- which were drawn up by the Authority and signed by the three cities and upon which the ordinances are based -- expressly reflect that the intended effect of the ordinances is to assure the Authority's economic success by keeping locally generated solid waste out of interstate commerce and within the local area, and thus provide a steady and adequate supply for the Authority.

Waste Recycling, 814 F.Supp., at 1572-1573.

In refusing to grant "market participant" status to the defendant, the Court focused on the civil and criminal penalty provisions that the ordinances and users contracts imposed for flow control violations:

> The ordinances and the user contracts also contain measures that are clearly and uniquely regulatory and governmental in nature. The ordinances require public participation; prohibit private businesses from collecting and disposing of solid waste unless the businesses comply with the ordinances; prohibit businesses who fail to comply with the ordinances from using public streets to collect and haul solid waste; and threaten civil enforcement and misdemeanor penalties against violators.

814 F.Supp. at 1573.

The Court concluded that the offending flow control ordinances and related user contracts were not indicative of market participation since:

> The cities would be able to implement such provisions only because of the regulatory powers they possess as sovereigns. These are not the types of measures which private participants in the marketplace could implement

814 F.Supp. at 1573.

Since the Second Circuit came to an opposite conclusion, certiorari should be granted to resolve the conflict.

CONCLUSION

This Court should grant the writ to decide whether the market participant doctrine was properly applied, and whether the Second Circuit improperly reversed the informed decision of the District Court which granted summary judgment to petitioner.

Respectfully submitted,

Dated: November 15, 1995

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APPENDIX

APPENDIX A

Second Circuit Decision,
September 19, 1995

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1417 August Term, 1994

Argued: February 21, 1995
Decided: September 19, 1995

Docket No. 94-9192

SSC CORP.,

Plaintiff-Counter-Defendant-Appellee,

v.

TOWN OF SMITHTOWN, TOWN BOARD OF THE TOWN OF SMITHTOWN, and Patrick Vecchio, AS SUPERVISOR, TOWN OF SMITHTOWN,

Defendants-Counter-Claimants-Appellants.

Before: NEWMAN, Chief Judge, VAN GRAAFEILAND, and CABRANES, Circuit Judges.

Appeal from and order of the United States District Court for the Eastern District of New York (Thomas C. Platt, Jr., Chief Judge), granting appellee's motion for summary judgment. The district court found that Smithtown's flow control ordinance, as well as its waste disposal contract with SSC, impermissibly disciminated against interstate commerce in violation of the "dormant" Commerce Clause of the United States

Constitution. We agree that the ordinance is unconstitutional. The contract, however, constitutes participation by Smithtown in the waste disposal market rather than regulation of interstate commerce, and therefore is not barred by the Commerce Clause.

Affirmed in part and reversed inpart.

Michael J. Cahill, Sinnreich Wasserman, Grubin & Cahill, Hauppauge, NY (James Joyce, John Zollo, of counsel) for defendants-counter-claimants-appellees.

Leon Friedman, New York City (David L. Snyder, Snyder & Snyder, White Plains, NY, of counsel), for plaintiff-counter-defendant-appellee.

JOSE A. CABRANES, Circuit Judge:

A law professor at Harvard is said to have remarked facetiously, a generation ago, that the greatest constitutional cases had concerned the sale and distribution of milk. The story might well be apocryphal as well as hyperbolic but there is truth to the statement, evidenced by the ubiquity of milk in the Supreme Court's Commerce Clause jurisprudence.[1] Although the

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[1] See, e.g., *Polar Ice Cream & Creamery Co. v. Andrews*, 375 U.S. 361, 84 S.Ct. 378, 11 L.Ed.2d 389 (1964) (invalidating Florida regulation reserving to local producers a substantial share of local milk market); *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 71 S.Ct. 295, 95 L.Ed. 329 (1951) (striking down city ordinance forbidding sale of milk unless bottled and pasteurized within five miles of city center); *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 69 S.Ct. 657, 93 L.Ed. 865 (1949) (invalidating New York's refusal to permit Massachusetts milk distributor to build additional purchasing center in New York, which would divert locally produced milk to out-of-state markets); *Milk Control Bd. v. Eisenberg Farm Prods.*, 306 U.S. 346, 59 S.Ct. 528, 83 L.Ed. 752 (1939) (upholding Pennsylvania statute establishing minimum prices to be paid to in-

flood of milk cases has receded in recent years, it has given way to a federal docket that is just as clogged with -- of all things -- garbage. No fewer than six times in the past seven years as the Supreme Court granted certiorari to decide a case involving the disposal of solid or hazardous waste.[2]

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state dairy farmers, on grounds that effect on interstate commerce was incidental); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 55 S.Ct. 97, 79 L.Ed. 1032 (1935) (striking down New York statute setting minimum price for milk dealers to pay to in- or out-of-state dairy farmers); *Schollenberger v. Pennsylvania*, 171 U.S. 1, 18 S.Ct. 757, 43 L.Ed. 49 (1898) (invalidating Pennsylvania statute banning importation of oleomargarine--a butter substitute--for sale); see also *Nebbia v. New York*, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940 (1934) (upholding New York milk price controls against due process and equal protection challenges). More recent cases include *West Lynn Creamery, Inc. v. Healy*, --- U.S. ----, 114 S.Ct. 2205, 129 L.Ed.2d 157 (1994) (invalidating Massachusetts program assessing nondiscriminatory tax on all milk sold in state, but using proceeds of that tax to subsidize only in-state dairy farmers), *Id.* at ---- n. 22, 114 S.Ct. at 2218 n. 22 (commenting on "the surprisingly large number" of cases involving dairy farmers in Commerce Clause jurisprudence), and *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366, 96 S.Ct. 923, 47 L.Ed.2d 55 (1976) (striking down Mississippi regulation permitting out-of-state milk to be sold in Mississippi only if the state of origin accepted Mississippi milk on a reciprocal basis).

The nexus between milk and garbage is significant, but often overlooked. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 101 S.Ct. 715, 66 L.Ed.2d 659 (1981) (rejecting Commerce Clause challenge to Minnesota statute prohibiting distribution of milk in nonrecyclable, nonreturnable plastic containers).

[2] *C & A Carbone, Inc. v. Town of Clarkstown*, --- U.S. ----, 114 S.Ct. 1677, 128 L.Ed.2d 399 (1994); *Oregon Waste*

Not long ago, municipalities took out the trash simply by hauling it to the local dump.[3] But as landfills have reached the bursting point, and as environmental regulations have burgeoned,[4] local governments have been forced to make significant investments and become more innovative in safely and legally disposing of trash. These investments and innovations include the multifarious transfer stations, recycling centers, and incinerators that have mushroomed throughout the land in the past decade.

Smithtown, New York, responded to the environmental and regulatory crisis by arranging with the neighboring town of Huntington for the construction of a garbage incinerator -- an incinerator that would be owned and operated by a private company, but financed by the towns. The two towns hoped that the incinerator would stem the flow of solid waste filling up the town dump, put the garbage to practical use by generating electricity, and ensure a reliable method of waste disposal for town residents for years to come. As part of its overall solid waste plan, and to protect its financial

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Sys., Inc. v. Department of Envtl. Quality, --- U.S. ----, 114 S.Ct. 1345, 128 L.Ed.2d 13 (1994); *Fort Gratiot Landfill v. Michigan Dep't of Natural Resources*, 504 U.S. 353, 112 S.Ct. 2019, 119 L.Ed.2d 139 (1992); *Chemical Waste Management Inc. v. Hunt*, 504 U.S. 334, 112 S.Ct. 2009, 119 L.Ed.2d 121 (1992); *New York v. United States*, 505 U.S 144, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992) (holding that Congress may not compel states to enact legislation through coercive "take title" provisions regarding hazardous waste); *City of Philadelphia v. New Jersey*, 437 U.S. 617, 98 S.Ct. 2531, 57 L.Ed.2d 475 (1978).

[3] See *Carbone*, 114 S. ct. at 1693 (Souter, J., dissenting).

[4] See, e.g., Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§9601-9657 (1988 & Supp. V 1993).

investment in the incinerator, Smithtown pursued two parallel strategies. First, it passed a "flow control" ordinance that required all residential and commercial garbage generated in town to be disposed of at the incinerator, where Smithtown charges so-called "tipping fees" based on the amount of garbage dumped.[5] Second, Smithtown created a residential garbage collection district and entered into a contract with private garbage haulers to pick up all household garbage in the district. Under the terms of the contract, the haulers were required to bring that garbage to the incinerator.

The United States District Court for the Eastern District of New York (Thomas C. Platt, Chief Judge) invalidated both the ordinance and contract under the dormant Commerce Clause of the United States Constitution,[6] relying on the Supreme Court's holding in *C & A Carbone, Inc. v. Town of Clarkstown*, --- U.S. ----, 114 S.Ct. 1677, 128 L.Ed.2d 399 (1994), that a similar ordinance impermissibly discriminated against interstate

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[5] "Sometimes referred to as a gate fee or disposal charge, the term 'tipping fee' is derived from the fact that trucks delivering waste must 'tip' the back-end of the truck to drop off the waste." Eric S. Petersen & David N. Abramowitz, *Municipal Solid Waste Flow Control in the Post-Carbone World*, 22 FORDHAM URB. L.J. 361, 369 n. 46 (1995).

[6] The Commerce Clause provides that "Congress shall have Power ... To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3. The term "dormant" Commerce Clause refers to the negative implications of that constitutional provision that limit the authority of state and local governments that either discriminate against, or unduly burden, interstate commerce. *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, --- U.S. ----, ----, 115 S.Ct. 1331, 1335, 131 L.Ed.2d 261 (1995).

commerce. Smithtown asks this court to distinguish the virtues of its flow control ordinance and residential garbage collection contract from the vices of the flow control ordinance struck down in Carbone. Smithtown contends primarily that its extensive financial stake in the local incinerator makes the town a "market participant" in the waste disposal market, and therefore exempts both its flow control ordinance and contract from the proscriptions of the Commerce Clause.

We conclude that Smithtown's flow control ordinance -- enforceable by criminal fines and jail terms -- clearly constitutes municipal regulation of the waste disposal market, not participation in that market, thus subjecting the ordinance to Commerce Clause scrutiny. Following the Commerce Clause analysis set forth by the Supreme Court in *Carbone*, we are compelled to find that the ordinance impermissibly discriminates against interstate commerce. On the other hand, we find that Smithtown's garbage hauling contract with SSC constitutes municipal participation in both the waste collection and disposal markets, and is thus free from the strictures of the Commerce Clause.

Accordingly, we affirm the district court's judgment striking down the flow control ordinance, but reverse its invalidation of the contract.

I. FACTS

A. Background

Smithtown is a municipality in northwestern Suffolk County on Long Island, New York, with a population of approximately 125,000. In the mid-1980s, following the adoption of various federal[7] and New York

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[7] The Resource Conservation and Recovery Act of 1976 ("RCRA"), Pub.L. No. 94-580 (codified at 42 U.S.C. §§6901-6902), for example, required states receiving federal financial assistance under the Act to "prohibit the establishment of new open dumps" and to require all

State[8] policies designed to upgrade or replace old landfills that were either full or unsafe, Smithtown began negotiations with the neighboring town of Huntington to provide joint waste disposal service for residents of both towns. The towns entered into a municipal agreement, authorized by special state statute, to share Smithtown's existing landfill and Huntington's incinerator, whose construction was underway but incomplete at the time of the agreement.[9]

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solid waste to be either "utilized for resource recovery" or "disposed of in sanitary landfills" that satisfy standards promulgated by the U.S. Environmental Protection Agency. 42 U.S.C. § 6943(a)(2) (1988). The legislation provides some leeway for a state to upgrade its open dumps to sanitary landfills, provided that it establish an approved timetable for compliance. Id. § 6945. Pursuant to RCRA, the EPA has promulgated minimum national criteria for municipal solid waste landfills in Part 258 of 40 C.F.R. (1994).

[8] The Long Island Landfill Law, 1983 N.Y.Laws 299 (codified at N.Y. ENVTL. CONSERV. LAW § 27-0704 (McKinney 1984)), phased out the practice of landfilling raw garbage, prohibited development of new landfills in deep flow groundwater recharge zones, and designated resource recovery, incineration, or composting as the preferred alternatives for disposal of municipal solid waste on Long Island.

[9] In December 1989, the towns of Smithtown and Huntington executed a Municipal Cooperation Agreement under Article 5G of the General Municipal Law of the State of New York. See N.Y.GEN.MUN.LAW §§ 119-m to -oo (McKinney 1986 & Supp.1994). Under this agreement, the two towns assumed joint responsibility for the obligations originally incurred by Huntington in its Service Agreement with the operator of the incinerator, and in related agreements with the New York State Environmental Facilities Corporation and the State of New York, both of which contributed grant funds to the project. The

The incinerator was built and is operated by a private company, Ogden Martin Systems ("Ogden"),[10] on land owned by the town of Huntington. The service contract between Ogden and the towns stipulates that Ogden "is the sole owner" of the incinerator, and that the towns are "customer[s] only."

The towns financed construction of the incinerator through tax-free bonds issued by the New York State Environmental Facilities Corporation, a public authority. The bonding authority lent the proceeds from the bonds to Ogden to build the incinerator. These bonds are secured primarily by a twenty-five year contractual obligation of Smithtown and Huntington to reimburse Ogden for the construction and operation costs of the incinerator. This obligation is known as the "Service Fee," and is payable regardless of whether any waste is delivered to the incinerator. Accordingly, the towns pay the Service Fee to Ogden, which repays the state bonding authority, which in turn repays the bondholders. To satisfy its share of the Service Fee, Smithtown relies on funds from two sources: (1) ad valorem property taxes and (2) tipping fees at the incinerator.

In return for paying the Service Fee, Smithtown and Huntington own exclusive rights to decide what waste may be disposed at the incinerator, and thus to charge tipping fees for garbage that is dumped there.

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towns also agreed to share certain obligations incurred by Smithtown to expand its existing landfill. Each town is entitled to equal access and use of both the Huntington incinerator and the Smithtown landfill under the municipal agreement.

[10] Ogden is a Delaware corporation that formed a Delaware limited partnership, C-E Huntington L.P., as a special subsidiary to construct and operate the Huntington incinerator.

B. The Flow Control Ordinance

To ensure a steady flow of garbage to the Huntington incinerator (and thus to ensure a steady flow of tipping fees), Smithtown enacted a "flow control" ordinance in 1991 that provides as follows:

> No person authorized to collect or transport acceptable waste within the Town of Smithtown shall dispose of acceptable waste generated within the Town of Smithtown except at a solid waste management facility designated by the Town Board pursuant to this section.

SMITHTOWN CODE § 177-17(B) (1994).[11] Pursuant to this ordinance, Smithtown's Town Board designated the Huntington incinerator as the disposal site for both residential and commercial garbage[12] generated in town.

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[11] The town code defines "acceptable waste" as

> Only solid waste acceptable at specific town-designated facilities, including but not limited to garbage, trash, rubbish, refuse, construction and demolition materials and yard waste that are normally disposed of by and collected from residential, commercial, industrial, governmental, community facilities or institutional establishments, except that "acceptable wastes" shall not include unacceptable waste and recyclables.

SMITHTOWN CODE § 177-4 (1994). "Unacceptable waste" and "recyclables" are defined elsewhere in the town code.

[12] For convenience, this opinion will use the terms "garbage" and "acceptable waste" interchangeably.

For recyclables, the Board designated the adjacent town recycling center. Smithtown charges tipping fees of $65 per ton of garbage dumped at the incinerator, but imposes no charges for recyclables brought to the recycling center. Id. § 177-83(D)(1)-(2). The town charges tipping fees for garbage only in order to encourage haulers to divert recyclables out of the solid waste stream.

Violation of the flow control ordinance is an unclassified misdemeanor, punishable by a fine of up to $5,000 and up to 60 days' imprisonment. Id. § 177-102.

C. The Improvement Contract

The second major step in Smithtown's solid waste plan was to arrange for municipal garbage collection and disposal for all town residents. In 1991, the town divided its residential areas into ten improvement districts and solicited competitive bids for waste collection services in each district.[13] The town also drew up a standard form contract (the "Improvement contract"), which all successful bidders had to sign, and which required them to dispose of residential garbage at the Huntington incinerator. Accordingly, they must factor into their bids the $65 per ton tipping fee charged by Smithtown for using the incinerator, and an estimate of the amount of waste generated in the district for which they are bidding.[14]

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[13] The improvement districts include all residences in Smithtown, except for those in three incorporated villages.

[14] "It is the responsibility of ... each Prospective Bidder to determine to their own satisfaction, the quantity of Residential Solid Waste to be generated in each Contract Bid Area and to include the costs for disposal of the residential solid waste, at the prescribed tipping fees, in the Itemized Bid Proposal." § 1.07(A)(2), Contract.

Smithtown awarded seven of the ten residential contracts to SSC. SSC began to pick up household garbage in January 1992. In compliance with contract requirements, SSC used Smithtown's published tipping fee of $65 per ton at the Huntington incinerator to arrive at a proposed annual disposal cost of approximately $92 per household. This disposal cost, added to an estimate of $126 per household for collection service, amounted to a total bid of $218 per household in 1994.

Smithtown assessed that $218 as a user fee on each residential homeowner's annual property tax bill. The town then used that user fee to pay SSC under the Improvement contract.

In early April 1994, Smithtown accused SSC of breaching the contract by diverting town residential garbage to disposal facilities other than the Huntington incinerator. SSC was allegedly pocketing the difference between the $65 per ton tipping fees built into the contract and reimbursed by Smithtown, and lower fees charged at other disposal facilities. By resolution of the Town Board, Smithtown withheld more than $750,000 in contract payments from SSC.

On April 28, 1994, SSC filed this action pursuant to 42 U.S.C. § 1983 (1988), seeking to enjoin Smithtown from enforcing the contractual provisions and the flow control ordinance, to the extent that those provisions required the hauler to deliver all town garbage to the Huntington incinerator.[15] SSC claimed that both the

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[15] SSC collects residential garbage in Smithtown pursuant to the Improvement contract, and commercial garbage pursuant to private agreements with various Smithtown businesses. SSC has not challenged Smithtown's authority to create improvement districts for the collection of residential garbage, or to contract with a private company to collect that garbage. Instead, the plaintiff garbage hauler only contests Smithtown's right to include in the contract the requirements that

contract and the ordinance violated the Commerce Clause. Smithtown counterclaimed for breach of contract.

After the Supreme Court handed down its decision in *C & A Carbone, Inc. v. Town of Clarkstown*, --- U.S. ----, 114 S.Ct. 1677, 128 L.Ed.2d 399 (1994), Chief Judge Platt granted summary judgment for SSC. In a terse oral ruling, the judge stated that the Smithtown waste control program -- both the flow control ordinance and the Improvement contract -- violated the dormant Commerce Clause under *Carbone*. Smithtown appeals.

II. DISCUSSION

A. The Legal Standard: The Dormant Commerce Clause & The Market Participant Doctrine.

1. Dormant Commerce Clause

The Commerce Clause is primarily an affirmative grant of power to Congress. "Congress shall have Power ... To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes...." U.S. CONST. art. I, § 8, cl. 3. The power to regulate interstate commerce is extraordinarily far-reaching[16] and authorizes Congress to preempt a broad spectrum of

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SSC bring its garbage to a designated waste disposal facility.

[16] See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985) (rejecting Commerce Clause challenge to Congress's enactment of employment regulations applicable to the states). There are, however, some limits to this power. See *United States v. Lopez*, --- U.S. ----, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995) (invalidating federal statute that criminalizes possession of firearms within school zones, as exceeding Congress's power to regulate interstate commerce).

state regulations. If Congress has not exercised its commerce powers in a given area, states can generally legislate over that area until Congress chooses to step in. Thus, most laws regulating commerce are written upon a sort of legal palimpsest: state laws remain on the books until Congress chooses to overwrite them.

The Supreme Court, however, has long interpreted the Commerce Clause "not only as an authorization for congressional action, but also, even in the absence of a conflicting federal statute, as a restriction on permissible state regulation." *Hughes v. Oklahoma*, 441 U.S. 322, 326, 99 S.Ct. 1727, 1731, 60 L.Ed.2d 250 (1979). Accordingly, the Court has treated at least some core area of interstate commercial regulation not as a palimpsest, but rather as a tabula that must remain rasa until Congress decides to legislate. Whether or not the Founders intended this "negative" or "dormant" component to the Commerce Clause has been hotly debated.[17] In any event, federal courts have

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[17] See, e.g., *Tyler Pipe Indus. v. Washington State Dep't of Revenue*, 483 U.S. 232, 259-65, 107 S.Ct. 2810, 2826-29, 97 L.Ed.2d 199 (1987) (Scalia, J., concurring in part and dissenting in part) (arguing that Framers did not intend "negative" or "dormant" component of Commerce Clause); *Itel Containers Int'l Corp. v. Huddleston*, --- U.S. ----, ----, 113 S.Ct. 1095, 1106, 122 L.Ed.2d 421 (Scalia, J., concurring in part and concurring in the judgment) (concurring in enforcement of dormant Commerce Clause on stare decisis grounds); FELIX FRANKFURTER, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE 12 (1937) (describing absence of comment during drafting and ratification of Constitution regarding possible negative implications of Commerce Clause); Albert S. Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN.L.REV. 432, 493 (1941) (arguing that historical evidence "supports the view that, as to the restricted field which was deemed at the time to constitute regulation of commerce, the grant of power to the

for more than 150 years invoked the Commerce Clause to scrutinize state regulations affecting interstate commerce, even in the absence of conflicting congressional legislation. See generally *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 769, 65 S.Ct. 1515, 1520, 89 L.Ed. 1915 (1945); *Case of the State Freight Tax*, 82 U.S. (15 Wall.) 232, 272, 21 L.Ed. 146 (1873) ("[T]he domain of the [federal government] should be preserved free from invasion, and ... no State legislation should be sustained which ... assumes to regulate, or control subjects committed by th[e] Constitution exclusively to the regulation of Congress."); *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299, 319, 13 L.Ed. 996 (1851) ("Whatever subjects of this [commerce] power are in their nature national, or admit only of one uniform system, or plan or regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress."); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 199-200, 6 L.Ed. 23 (1824) (Marshall, C.J.) (implying that a state oversteps its powers when it regulates interstate commerce because "it is exercising the very power that is granted to congress, and is doing the very thing which congress is authorized to do").

In applying the dormant Commerce Clause, the courts have identified guiding principles -- limiting "protectionist" state legislation and fostering the development of a unified national market--that presumably motivated the Founders to endow Congress with the affirmative power to regulate commerce. As Justice Jackson wrote:

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his

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federal government presupposed the withdrawal of authority pari passu from the states.").

> exports, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.

H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 539, 69 S.Ct. 657, 665, 93 L.Ed. 865 (1949), quoted in *West Lynn Creamery, Inc. v. Healy*, --- U.S. ----, ----, 114 S.Ct. 2205, 2218, 129 L.Ed.2d 157 (1994). The Court has defined "protectionist" state legislation as "regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 273-74, 108 S.Ct. 1803, 1807, 100 L.Ed.2d 302 (1988).

To implement the goals of curbing local protectionism and facilitating a national market, the courts have derived from the Commerce Clause limitations on the states' abilities to legislate in service of parochial interests. State regulations that discriminate against interstate commerce are subject to a "virtually per se rule of invalidity." *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624, 98 S.Ct. 2531, 2535, 57 L.Ed.2d 475 (1978). By "discrimination," we mean "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Sys., Inc. v. Department of Envtl. Quality*, --- U.S. ----, ----, 114 S.Ct. 1345, 1350, 128 L.Ed.2d 13 (1994). "But where other legislative objectives are credibly advanced and there is no patent discrimination against interstate trade, the Court has adopted a much more flexible approach, the general contours of which were outlined in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 847, 25 L.Ed.2d 174 [(1970)]...." In *Pike*, the Court explained that a state regulation having only "incidental" effects on interstate commerce "will be upheld unless the burden imposed on such commerce is clearly excessive

in relation to the putative local benefits." 397 U.S. at 142, 90 S.Ct. at 847. When weighing burdens against benefits, a court should consider both "the nature of the local interest involved, and ... whether it could be promoted as well with a lesser impact on interstate activities."

2. The Market Participant Exception

The Commerce Clause only grants to Congress -- and correspondingly withholds from the states -- the power to "regulate Commerce ... among the several States." (emphasis added). Because the power conferred by the Constitution is the power to "regulate," the strictures of the dormant Commerce Clause are not activated unless a state action may be characterized as a "regulation." At the threshold of its Commerce Clause analysis, the Supreme Court has drawn an important distinction between "regulation" of, and "participation" in, a market. When a state engages in market "participation" -- that is, when it enters the open market as a buyer or seller on the same footing as private parties -- there is less danger that the state's activity will interfere with Congress's plenary power to regulate the market. As the Court has explained, the Commerce Clause "restricts 'state taxes and regulatory measures impeding free private trade in the national marketplace,' but '[there] is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market.' " *Wisconsin Dep't of Indus., Labor & Human Relations v. Gould Inc.*, 475 U.S. 282, 289, 106 S.Ct. 1057, 1062, 89 L.Ed.2d 223 (1986) (quoting *Reeves, Inc. v. Stake*, 447 U.S. 429, 437, 100 S.Ct. 2271, 2277, 65 L.Ed.2d 244 (1980)). Pursuant to this doctrine -- the "market participant" exception to the dormant Commerce Clause -- states are permitted to enter a market with the same freedoms and subject to the same restrictions as a private party.[18] To the extent

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[18] The "market participant" doctrine applies to local as well as state governments. See *White v. Massachusetts Council of Constr. Employers*, 460 U.S. 204, 103 S.Ct.

that a state is acting as a market participant, it may pick and choose its business partners, its terms of doing business, and its business goals -- just as if it were a private party.

The Supreme Court introduced the market participant doctrine in *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 96 S.Ct. 2488, 49 L.Ed.2d 220 (1976), which upheld a Maryland program that offered bounties to scrap processors to destroy abandoned automobile hulks. Because Maryland required out-of-state processors, but not in-state processors, to submit burdensome documentation to claim their bounties, the state effectively favored in-state processors over out-of-state processors. The Court held that because the state was merely attaching conditions to its expenditure of state funds, the Maryland program affected the market no differently than if Maryland were a private company bidding up the price of auto hulks. Because the state was not "regulating" the market, its economic activity was not subject to the antidiscrimination principles underlying the dormant Commerce Clause -- and the state could impose different paperwork burdens on out-of-state processors. "Nothing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others." Id. at 810, 96 S.Ct. at 2498 (footnotes omitted).

1042, 75 L.Ed.2d 1 (1983) (finding that city of Boston is market participant). Because the Commerce Clause only governs the category of activity known as "market regulation," the determination that an actor is "participating" in the market places that activity outside the purview of Commerce Clause restrictions, whatever the identity of the actor. This differs from Eleventh Amendment doctrine, for example, where the states, but not local governments, enjoy immunity from suit in federal court. See *Monell v. Department of Social Servs.*, 436 U.S. 658, 690 n. 54, 98 S.Ct. 2018, 2035 n. 54, 56 L.Ed.2d 611 (1978).

The Court next invoked the market participant exception in *Reeves, Inc. v. Stake*, 447 U.S. 429, 100 S.Ct. 2271, 65 L.Ed.2d 244 (1980), permitting South Dakota to confine sales from a state-owned cement factory to state residents. Noted the majority:

> [S]tate proprietary activities may be, and often are, burdened with the same restrictions imposed on private market participants. Evenhandedness suggests that, when acting as proprietors, States should similarly share existing freedom from federal constraints, including the inherent limits of the Commerce Clause.

447 U.S. at 439, 100 S.Ct. at 2278. Like any other purveyor of cement, South Dakota enjoyed "'the long recognized right of trader or manufacturer, engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.' " *Id.* at 438-39, 100 S.Ct. at 2278 (quoting *United States v. Colgate & Co.*, 250 U.S. 300, 307, 39 S.Ct. 465, 468, 63 L.Ed. 992 (1919)). The Court reiterated this holding in *Wyoming v. Oklahoma*, 502 U.S. 437, 458, 112 S.Ct. 789, 802, 117 L.Ed.2d 1 (1992), where the Court stated that under the market participant doctrine, Oklahoma faced no Commerce Clause obstacle in directing its state-owned power plants to burn at least ten percent Oklahoma-mined coal. [19] Like any other buyer in the coal market, Oklahoma could buy its coal from whomever it pleased--meaning that the state could favor its own residents when spending state funds.

In *White v. Massachusetts Council of Construction Employers*, 460 U.S. 204, 103 S.Ct. 1042, 75 L.Ed.2d 1 (1983), the Supreme Court held that the city of Boston

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[19] The Court ultimately struck down the Oklahoma statute because it also applied to privately owned power plants. 502 U.S. at 454-59, 112 S.Ct. at 800-02.

was a participant in the labor market, and thus was not "regulating" commerce in violation of the Constitution in requiring all city-funded construction projects to be performed by a work force of at least fifty percent Boston residents. The practical effect of this order was to require all city building contractors to hire half of their workers from Boston. While the Court agreed that "there are some limits on a state or local government's ability to impose restrictions that reach beyond the immediate parties with which the government transacts business," it declined to

> define those limits with precision, except to say that we think the Commerce Clause does not require the city to stop at the boundary of formal privity of contract. In this case, the [employment mandate] covers a discrete, identifiable class of economic activity in which the city is a major participant. Everyone affected by the [mandate] is, in a substantial if informal sense, "working for the city."

Id. at 211 n. 7, 103 S.Ct. at 1046 n. 7. As a purchaser of construction services, Boston was essentially participating in the construction labor market. Because the money for the workers was coming indirectly from the Boston treasury, the city was allowed to favor its own citizens without running afoul of the dormant Commerce Clause.

One year later, the Supreme Court rejected Alaska's invocation of the market participant doctrine in *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 104 S.Ct. 2237, 81 L.Ed.2d 71 (1984) (plurality opinion with respect to market participant question). Alaska had instituted a program of selling timber at a significantly reduced price from state-owned forests only on the condition that buyers agree to process that timber at in-state facilities prior to export. The Court held that "although the State may be a participant in the timber market, it is using its leverage in that market to exert a

regulatory effect in the processing market, in which it is not a participant." *Id.* at 98, 104 S.Ct. at 2245. As the Court pointed out, a private seller of goods has no proprietary interest in what the buyer later does with those goods when the seller is not a participant in a downstream market. See *id.* at 96, 104 S.Ct. at 2245. Inasmuch as Alaska retained no proprietary interest in the timber after the point of sale, the state could not be considered a participant in the downstream processing market. Unlike the programs at issue in Alexandria Scrap, Reeves, and White, Alaska's timber sales did not involve the direct expenditure of state funds. Instead, the state was trying to coerce private parties to use their own money to patronize local industries.

B. Smithtown's Flow Control Ordinance

1. Market Participation

Before determining whether Smithtown's flow control ordinance constitutes discriminatory or burdensome regulation of interstate commerce, we must first answer a threshold question: Is the ordinance a "regulation" at all, or does it merely constitute "participation" by Smithtown in the local waste disposal market?[20]

SSC argues that Smithtown's flow control ordinance cannot be considered municipal "participation" in the waste disposal market because the ordinance constitutes an exercise of the town's

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[20] We note preliminarily that the market participant doctrine was not mentioned in any of the several opinions in Carbone. Although in his dissent Justice Souter contended that the Clarkstown transfer station was "essentially a municipal facility," --- U.S. at ----, 114 S.Ct. at 1696, he did not argue that the town's favoritism of the transfer station therefore constituted participation in the waste disposal market that was exempt from Commerce Clause analysis.

"sovereign powers of civil and criminal enforcement." Smithtown responds, first, that it is generally a "participant" in the waste disposal market because it has placed substantial public funds at risk by assuming extensive financial obligations in connection with the Huntington incinerator. The town further contends that the flow control ordinance is valid under the market participant exception because it protects the town's financial investment in the incinerator. We agree with SSC.

To the extent that the flow control ordinance threatens garbage haulers with criminal fines and jail terms if they fail to do business with Smithtown at the Huntington incinerator, the town is engaging in market regulation, not market participation. See *Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders*, 48 F.3d 701, 717 (3d Cir.1995) (rejecting argument that flow control ordinance constituted market participation where county purchased landfill services for resale and required garbage haulers to buy those services from county). No private company in the open market could force others to buy its services under pain of criminal penalties. See *Washington State Bldg. & Constr. Trades v. Spellman*, 684 F.2d 627, 631 (9th Cir.1982) (rejecting market participation characterization of program relying on "civil and criminal penalties which only a state and not a mere proprietor can enforce"), *cert. denied*, 461 U.S. 913, 103 S.Ct. 1891, 77 L.Ed.2d 282 (1983).

Smithtown points to language in *South-Central Timber* stating that although Alaska "may be a participant in the timber market, it is using its leverage in that market to exert a regulatory effect in the processing market, in which it is not a participant," 467 U.S. at 98, 104 S.Ct. at 2245 (emphasis added). According to Smithtown, the Court was suggesting that Alaska's local processing requirements would have been exempt from Commerce Clause scrutiny if the state had somehow participated in the processing market -- for example, by owning a few timber mills. This argument is

refuted by *Wyoming v. Oklahoma*, 502 U.S. 437, 112 S.Ct. 789, 117 L.Ed.2d 1 (1992), where the Court struck down an Oklahoma statute requiring all in-state electrical utilities (both private and public) to use at least ten percent Oklahoma-mined coal to fuel their power plants. The Court acknowledged that with respect to state-owned utilities, Oklahoma was participating as a purchaser in the coal market and therefore could decide to purchase only local coal. But simply because Oklahoma was in one respect a "participant" in the coal market did not mean that in all respects its activity affecting the coal market constituted "market participation." A state's actions constitute "market participation" only if a private party could have engaged in the same actions. For this reason, the Court invalidated as "regulation" Oklahoma's imposition of a local-purchasing requirement on private market participants, even though it found the state otherwise to be a "participant" in the local coal market.

Smithtown also draws our attention to *City of Philadelphia v. New Jersey*, 437 U.S. at 627 n. 6, 98 S.Ct. at 2537 n. 6, where the Supreme Court reserved decision as to whether operation of a landfill by a government would constitute market participation. In *Swin Resource Systems, Inc. v. Lycoming County*, 883 F.2d 245, 250 (3d Cir.1989), *cert. denied*, 493 U.S. 1077, 110 S.Ct. 1127, 107 L.Ed.2d 1033 (1990), the Court of Appeals answered that question in the affirmative, holding that a local government operating a landfill was a market participant and could charge a lower fee for the disposal of locally generated waste. Smithtown argues that the Huntington incinerator, like the county landfill in Swin, is essentially a "municipal facility" that should qualify as "market participation" by the town. If Smithtown merely used favorable rates to entice town residents to use the local incinerator, it would be acting as a market participant as in *Swin*. The difference between the Smithtown ordinance and the arrangement challenged in Swin, however, is that Smithtown has established criminal penalties that effectively compel parties to buy services there. We agree with the Third Circuit that

> [w]hen a public entity participates in a market, it may sell and buy what it chooses, to or from whom it chooses, on terms of its choice; its market participation does not, however, confer upon it the right to use its regulatory power to control the actions of others in that market.

Atlantic Coast, 48 F.3d at 717. Thus, we conclude that Smithtown's flow control ordinance constitutes a "regulation" of the waste disposal market, rather than participation in that market. Hence, the ordinance is subject to Commerce Clause scrutiny. *White*, 460 U.S. at 210, 103 S.Ct. at 1046 ("Impact on out-of-state residents figures into the equation only after it is decided that the city is regulating the market rather than participating in it, for only in the former case need it be determined whether any burden on interstate commerce is permitted by the Commerce Clause.").

2. Commerce Clause Analysis

Our finding that the market participant exception does not apply to Smithtown's flow control ordinance compels us to turn to the question of whether the ordinance violates the Commerce Clause. Our analysis is governed by the recent case of *C & A Carbone v. Town of Clarkstown*, --- U.S. ----, 114 S.Ct. 1677, 128 L.Ed.2d 399 (1994), where the Supreme Court invoked the antidiscrimination principle of Commerce Clause jurisprudence to strike down a flow control ordinance enacted by Clarkstown, a community similar to Smithtown. Like Smithtown, Clarkstown had been experimenting with ways to ensure a cheap, reliable, and environmentally sound method of disposing of town garbage. Under pressure from state environmental agencies, Clarkstown agreed to close its old landfill and replace it with a new solid waste transfer station. The Court described Clarkstown's solution as follows:

> The cost of building the transfer station was estimated at $1.4 million. A local private contractor agreed to construct the facility and operate it for five years, after which the town would buy it for one dollar. During those five years, the town guaranteed a minimum waste flow of 120,000 tons per year, for which the contractor could charge the hauler a so-called tipping fee of $81 per ton. If the station received less than 120,000 tons in a year, the town promised to make up the tipping fee deficit. The object of this arrangement was to amortize the cost of the transfer station: The town would finance its new facility with the income generated by the tipping fees.
>
> The problem, of course, was how to meet the yearly guarantee. This difficulty was compounded by the fact that the tipping fee of $81 per ton exceeded the disposal cost of unsorted solid waste on the private market. The solution the town adopted was [a] flow control ordinance.... requir[ing] all nonhazardous solid waste within the town to be deposited at the [new] transfer station.... Noncompliance is punishable by as much as a $1,000 fine and up to 15 days in jail.

Id. at ----, 114 S.Ct. at 1680. After passage of the flow control ordinance, Carbone continued to ship solid waste to out-of-town transfer stations that charged lower tipping fees. Clarkstown sought a court order forcing Carbone to bring its garbage to the town's preferred transfer station.

The Supreme Court held that Clarkstown's flow control ordinance violated the dormant Commerce Clause. In the Court's view, the ordinance discriminated against interstate commerce in that it was "just one more

instance of local processing requirements" that are prohibited by the Commerce Clause. *Id.* at ----, 114 S.Ct. at 1682. The problem, the Court said, was that the ordinance hoarded a local resource -- the demand for processing solid waste -- for the benefit of a single local business. *Id.* at ----, ----, 114 S.Ct. at 1682, 1683. It made no difference that Clarkstown discriminated equally against out-of-state and in-state businesses in favoring a single local processor. In the Court's opinion, this only made "the protectionist effect of the ordinance more acute." *Id.* at ----, 114 S.Ct. at 1683. Because the Court found that the ordinance facially discriminated against interstate commerce, it subjected the Clarkstown ordinance to heightened scrutiny. "Discrimination against interstate commerce in favor of local business or investment is per se invalid, save in a narrow class of cases in which the municipality can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest." Id.; see also *City of Philadelphia v. New Jersey*, 437 U.S. at 624, 98 S.Ct. at 2535 ("[W]here simple economic protectionism is effected by state legislation, a virtually per se rule of invalidity has been erected.").

That the flow control ordinance was at bottom a financing measure, aimed at ensuring the viability of the new transfer station, did not excuse its discriminatory effect on interstate commerce. The Court stated that

> revenue generation is not a local interest that can justify discrimination against interstate commerce. Otherwise States could impose discriminatory taxes against solid waste originating outside the State.
>
> Clarkstown maintains that special financing is necessary to ensure the long-term survival of the designated facility. If so, the town may subsidize the facility through general taxes or municipal bonds. But having elected to use the open market to earn revenues for its project, the town

> may not employ discriminatory regulation to give that project an advantage over rival businesses from out of State.

Carbone, --- U.S. at ----, 114 S.Ct. at 1684 (citations omitted).

Carbone compels us to find that Smithtown's flow control ordinance facially discriminates against interstate commerce because it directs all town waste to a single local disposal facility, to the exclusion of both in-state and out-of-state competitors. Accordingly, Smithtown must "demonstrate, under rigorous scrutiny, that it has no other means [than its flow control ordinance] to advance a legitimate local interest." *Id.* at ----, 114 S.Ct. at 1683. In *Carbone*, Clarkstown's interest in ensuring safe, clean processing of town waste was insufficient to justify its flow control ordinance, since the town could have achieved the same result by enacting uniform health and safety regulations. *Id.* at ----, 114 S.Ct. at 1683. Likewise, the town could have achieved its goal of ensuring the financial viability of the local transfer station through general taxes or municipal bonds. *Id.* at ----, 114 S.Ct. at 1684. Because all of these options (and others) are open to Smithtown, its flow control ordinance cannot survive the "rigorous scrutiny" standard mandated by Carbone. We therefore find that the ordinance violates the dormant Commerce Clause.

B. Smithtown's Improvement Contract

Smithtown's improvement contract with SSC stands on more solid ground than does its flow control ordinance, inasmuch as we find that the contract constitutes market participation, rather than regulation. The central question in determining whether the contract constitutes "market participation" by Smithtown is whether it more closely resembles Boston's local-hiring requirements in *White*, or Alaska's local-processing requirements in *South-Central Timber*. In both cases, the government reached beyond "the boundary of formal privity of contract" to influence the

economic relationships between its trading partners and other parties. See *South-Central Timber*, 467 U.S. at 96, 104 S.Ct. at 2245; *White*, 460 U.S. at 211, 103 S.Ct. at 1046. Smithtown has done the same thing by contractually obligating SSC to do business at the Huntington incinerator. SSC argues that this violates the Commerce Clause because Smithtown, like Alaska in South-Central Timber, is flexing its economic muscle in the waste collection market to regulate the downstream market of waste disposal. We disagree.

Smithtown is a "major participant" in two "discrete, identifiable class[es] of economic activity": waste collection and waste disposal. See *White*, 460 U.S. at 211 n. 7, 103 S.Ct. at 1046 n. 7. When town garbage is picked up at the curb, and town garbage is burned to ash in the incinerator, Smithtown is "substantial[ly] if informal[ly]" receiving garbage collection and disposal services -- services for which it has chosen to "contract out" rather than to perform itself with town employees and town equipment. *Id.*

Smithtown is spending tax dollars to pay for both of these services, just as Boston was spending tax dollars to pay the salaries of its contractors' construction workers in *White*. "Insofar as the city expended only its own funds in entering into [waste disposal] contracts for public projects, it [is] a market participant...." *Id.* at 214-15, 103 S.Ct. at 1048.

If Boston could require contractors for city-funded projects to hire a certain percentage of city residents, then Smithtown can require SSC to hire town residents to drive its garbage trucks -- since those truck drivers would be "in a substantial if informal sense, 'working for the city.' " *Id.* at 211 n. 7, 103 S.Ct. at 1046 n. 7. And if Smithtown can require SSC to hire local truck drivers, then it can require the hauler to use local incinerating services as well. It makes no difference in our estimation whether those services are provided by a private company like Ogden, or by a public entity like Smithtown. Because the waste disposal services are

"substantial[ly] if informal[ly]" being provided to Smithtown, the town can decide with whom it will deal.

The itemization of "disposal" and "collection" charges on SSC's bid for the improvement contract reinforces our conclusion that Smithtown is a buyer, rather than a regulator, of disposal services, the ordinance and its criminal penalties notwithstanding. Because Smithtown pays the disposal portion of the bid to reimburse SSC for tipping fees at the Huntington incinerator, the disposal costs are "passed through" SSC to town residents -- who ultimately foot the bill for disposal through user fees assessed on their annual property tax bill.

There are four principal reasons why Smithtown charges SSC tipping fees at the incinerator and then reimburses SSC for those charges, instead of charging no tipping fees at the incinerator and simply keeping the taxpayers' user fees in the first place. First, and most importantly, Smithtown's tipping fees combat the free-rider problem (or free-dumper problem, as it were), by discouraging SSC and the other contract haulers from insinuating out-of-town garbage into the waste they bring to the Huntington incinerator. Second, by charging haulers $65 to dump a ton of garbage, but nothing to dump recyclables, Smithtown encourages its waste haulers to abide by their contractual obligation to separate recyclables from the waste stream. Third, the pass-through mechanism encourages bidders to forecast accurately the amount of waste generated in each improvement district, and not to "low-ball" their estimates to win the contract. If each bid area in the district generates less waste than contemplated by the prevailing estimate, the contractor keeps the difference between the bid and the actual disposal costs. If the area generates more garbage than expected, the hauler must still pay the tipping fees and absorb the excess. Fourth, by itemizing the disposal costs in the contract, Smithtown can easily adjust its charges to town residents in the event of a change in tipping fees. Thus, the principal purpose of the pass- through mechanism is to

minimize the town's costs of monitoring SSC's performance under the contract. That SSC pays tipping fees to use the incinerator does not detract from the reality that Smithtown is the one consuming--and ultimately paying for--those disposal services.

SSC directs our attention to *Waste Recycling v. Southeast Alabama Solid Waste Disposal Authority*, 814 F.Supp. 1566, 1570, 1575-77 (M.D.Ala.1993), *aff'd sub nom. Waste Recycling v. SE Al Solid*, 29 F.3d 641 (11th Cir.1994), where the court rejected application of the market participant doctrine to a garbage collection and disposal contract much like the one between Smithtown and SSC. An ordinance passed by the town of Geneva, Mississippi, vested in the town title to all locally generated waste, and prohibited private garbage collectors from contracting directly with generators of solid waste. The court refused to characterize the contract as market participation, on the theory that the town was not motivated purely by profit-making concerns, id. at 1573, and that it had no true proprietary interest in the garbage, id. at 1576.

We decline to adopt the reasoning of the *Waste Recycling* court. First, it is well established that a protectionist motive does not automatically render state activity "regulation." As the Supreme Court stated in *Reeves*:

> We find the label "protectionism" of little help in this context. The State's refusal to sell to buyers other than South Dakotans is "protectionist" only in the sense that it limits benefits generated by a state program to those who fund the state treasury and whom the State was created to serve. Petitioner's argument apparently also would characterize as "protectionist" rules restricting to state residents the enjoyment of state educational institutions, energy generated by a state-run plant, police and fire protection, and

> agricultural improvement and business development programs. Such policies, while perhaps "protectionist" in a loose sense, reflect the essential and patently unobjectionable purpose of state government -- to serve the citizens of the State.

447 U.S. at 442, 100 S.Ct. at 2280. In the three cases where the Supreme Court found that a state or city engaged in market participation, the government's motive in enacting the challenged legislation was admittedly not to maximize its own profits as a private company would. Rather, Boston sought to stimulate local employment in *White*; South Dakota sought to provide cheap products for state residents in *Reeves*; and Maryland aimed to abate a public nuisance in *Alexandria Scrap*.

Second, a town need not possess a proprietary interest in the garbage itself in order to place contractual restrictions on its disposal. As the Supreme Court observed in *Carbone*, the article of commerce is not merely the physical trash sitting in barrels or dumpsters, but also the demand for garbage processing and disposal services. *Carbone*, --- U.S. at ----, 114 S.Ct. at 1682. As discussed earlier, Smithtown has a very real interest in both the collection and disposal services, since it pays for both. If the town wished, it could perform these traditional municipal services itself (with public employees), or it could contract for each service separately. When the town buys the two in a bundle, it participates in the waste disposal market just as directly as -- indeed, even more directly than -- Boston participated in the labor market in *White*.

Our conclusion that Smithtown has an identifiable interest in the disposal of its garbage is reinforced by the towns' vulnerability to liability under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9607(a) (1988), if they "arrange" for the

disposal and treatment of municipal solid waste. *B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192, 1199 (2d Cir.1992) (holding municipalities subject to "arranger" liability under CERCLA). If Smithtown could not contractually designate where its waste should be disposed, it would be powerless to stave off future CERCLA liability. Because the specter of CERCLA liability is intended to encourage "arrangers" of waste disposal to select environmentally secure disposal sites, Congress clearly contemplated that towns would have some voice as to the selection of those sites.

That Smithtown has favored itself, rather than some private company, as the provider of disposal services does not affect our analysis. As discussed earlier, it is true that Smithtown "participates" in the waste disposal market not only as a buyer of disposal services from SSC, but also as a buyer of services from Ogden and a re-seller of those services to SSC. But while these latter two forms of doing business may constitute "market participation" on the part of Smithtown, they do not necessarily determine whether another town action -- buying disposal services through the improvement contract -- also constitutes market participation. Smithtown could not force SSC or anyone else to do business with the town as a seller of disposal services at the Huntington incinerator, without resorting to its police powers -- and thereby acting as a market regulator. But because Smithtown is substantially the buyer (and consumer) of those services, it can dictate by contract where SSC must purchase the waste disposal services provided to the town.

Finally, we address SSC's contention that Smithtown should not be considered a market participant, on the theory that such a characterization would subject the town to the antitrust laws. The logic of this argument escapes us. First, it is far from clear that treating Smithtown as a "market participant" for Commerce Clause purposes necessarily subjects it to the antitrust laws. As the Supreme Court held in *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389,

413, 98 S.Ct. 1123, 1136, 55 L.Ed.2d 364 (1978) (plurality opinion), the antitrust laws do not prohibit local governments from engaging in anticompetitive conduct "pursuant to state policy to displace competition with regulation or monopoly public service." See also *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 54, 102 S.Ct. 835, 842, 70 L.Ed.2d 810 (1982) (holding that municipalities are entitled to antitrust immunity "to the extent that they acted pursuant to a clearly articulated and affirmatively expressed state policy"). Smithtown's efforts to guarantee business for the Huntington incinerator have been actively encouraged by the State of New York, through its legislature, and thus would seem to enjoy antitrust immunity.[21] See *Hybud Equip. Corp. v. City of Akron*, 742

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[21] The New York State Legislature passed legislation specifically authorizing Smithtown to adopt ordinances

> imposing appropriate and reasonable limitations on competition with respect to collecting, receiving, transporting, delivering, storing, processing and disposing of solid waste or the recovery by any means of any material or energy product or resource therefrom, including local laws requiring that all solid waste generated, originated or brought within its boundaries, subject to such exceptions as may be determined to be in the public interest, shall be delivered to a specified solid waste management-resource recovery facility....

N.Y.GEN.MUN.LAW § 120-bb(4) (McKinney Supp.1994). The same statute specifically authorizes the Municipal Agreement between Huntington and Smithtown. Id. § 120-bb(1)-(3), (5)-(7). The Legislature specifically approved the cooperative venture between Smithtown and Huntington in legislative findings in 1989 N.Y.Laws 80. The Legislature found that

F.2d 949, 956 (6th Cir.1984), *cert. denied*, 471 U.S. 1004, 105 S.Ct. 1866, 85 L.Ed.2d 160 (1985) (applying *City of Lafayette* to find antitrust immunity for municipal solid waste services monopoly created pursuant to "clearly articulated and affirmatively expressed policy"); *Central Iowa Refuse Sys., Inc. v. Des Moines Metro. Solid Waste Agency*, 715 F.2d 419 (8th Cir.1983), *cert. denied*, 471 U.S. 1003, 105 S.Ct. 1864, 85 L.Ed.2d 158 (1985) (same); *Seay Bros. v. Albuquerque*, 601 F.Supp. 1518 (D.N.M. 1985) (finding antitrust immunity for city that implemented and supervised operation of refuse disposal monopoly); *Savage v. Waste Management, Inc.*, 623 F.Supp. 1505 (D.S.C.1985) (finding antitrust immunity for county that gave exclusive franchise for

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> the proper management of solid waste is æoften most economically and efficiently achieved by the cooperative regional development by municipalities of facilities designed to address their mutual disposal needs and that it is in the public interest to encourage such cooperation and that such cooperative development is consistent with the state's solid waste management policy.
>
> The legislature further finds and declares that the towns of Huntington and Smithtown have demonstrated the value of such cooperation and have moved forward to reduce, reuse and recycle solid waste pursuant to the statutory hierarchy established under the Solid Waste Management Act of 1988.

Smithtown's project also met with the approval of the state bonding authority, which lent funds to construct the incinerator. Any lingering doubt as to whether the State of New York approves of Smithtown's activities should be put to rest by the state's filing of an amicus brief in this case supporting Smithtown.

garbage collection and disposal); *Tri-State Rubbish, Inc. v. Waste Management, Inc.*, 803 F.Supp. 451 (D.Me.1992) (upholding municipal flow control ordinance against antitrust claims). But see *City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365, 378, 111 S.Ct. 1344, 1353, 113 L.Ed.2d 382 (1991) ("We reiterate that, with the possible market participant exception, any action that qualifies as state action is 'ipso facto ... exempt from operation of the antitrust laws.' " (quoting *Hoover v. Ronwin*, 466 U.S. 558, 580, 104 S.Ct. 1989, 2001, 80 L.Ed.2d 590 (1984))); *Jefferson County Pharmaceutical Ass'n v. Abbott Lab.*, 460 U.S. 150, 154, 103 S.Ct. 1011, 1015, 74 L.Ed.2d 882 (1983) (holding that states are subject to Robinson-Patman Act if they compete in the private retail market).

Second, and more important, it is unclear why this court should use the antitrust statutes -- which are subject to legislative change -- to guide our interpretation of the word "regulation" as defined in the Constitution. It is axiomatic that we prefer constructions of ordinances and statutes that do not conflict with the Constitution. *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346-48, 56 S.Ct. 466, 482-83, 80 L.Ed. 688 (1936) (Brandeis, J., concurring) ("[W]hen the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."). SSC would have us engage in a sort of reverse-Ashwander analysis and construe Smithtown's activity as violating the Commerce Clause rather than the antitrust laws. We decline the invitation to stand *Ashwander* on its head, and we adhere to our interpretation of the Commerce Clause.

III. CONCLUSION

To summarize:

1. Smithtown's flow control ordinance, which is enforceable through criminal penalties, constitutes

market regulation rather than market participation. The ordinance is indistinguishable from the one struck down by the Supreme Court in Carbone, and thus violates the dormant Commerce Clause.

2. The improvement contract constitutes municipal participation in both the waste collection and disposal markets, and thus does not violate the Commerce Clause.

The judgment is accordingly affirmed in part and reversed in part.

APPENDIX B

DISTRICT COURT JUDGMENT AND ORDER

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

SSC CORP.

Plaintiff,

-against-

TOWN OF SMITHTOWN, TOWN BOARD OF THE TOWN OF SMITHTOWN, and PATRICK VECCHIO, Supervisor, TOWN OF SMITHTOWN,

Defendants.

Civ. Act. No. 94 Civ. 1992 (TCP)

JUDGMENT AND ORDER

This matter having come before the Court on the cross-motions of the parties for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, 28 U.S.C.A., which motions were returnable on October 28, 1994, before Honorable Chief Judge Thomas C. Platt; and David L. Snyder, Esq. and Leon Friedman, Esq. having appeared for the plaintiff; and Michael Cahill, Esq. and James Joyce, Esq. having appeared for the defendants; and having considered the pleadings, motion papers and answers of the parties with respect to said motions, including all exhibits and a Joint Statement of Stipulated Facts dated August 1, 1994;

IT IS ORDERED that plaintiff's motion for summary judgment is GRANTED in its entirety; and defendants motion for summary judgment is DENIED in its entirety.

IT IS FURTHER ORDERED and ADJUDGED that those section of the Smithtown Town Code, including Sections 177-83.D(1) and 177-68 thereof, which operate to prohibit the movement of solid waste in interstate commerce, are violative of the dormant Commerce Clause of the United States Constitution and are therefore null, void and unenforceable.

IT IS FURTHER ORDERED and ADJUDGED that Sections 1.04(A).1 and 1.04(B).2 of the Residential Refuse Collection Contracts (the "Contracts") dated on or about December 19, 1991 between the Town of Smithtown and SSC Corp., are violative of the dormant Commerce Clause of the United States Constitution and are therefore null, void and unenforceable.

IT IS FURTHER ORDERED and ADJUDGED that the prior Stipulation and Order of this Court, filed on May 11, 1994, is VACATED, and defendants are directed to forthwith release to plaintiff the $150,000.00 security retainage authorized by said Order, including any accumulated interest.

IT IS FURTHER ORDERED and ADJUDGED that defendants' counterclaims based on alleged violations of those portions of the Smithtown Town Code and the Contracts which have by this ORDER been declared null, void and unenforceable, are DISMISSED.

IT IS FURTHER ORDERED and ADJUDGED that the remaining claims of the plaintiff are DISMISSED.

IT IS FURTHER ORDERED that the Court shall retain jurisdiction over this matter to the extent necessary to give affect to the terms and conditions of this ORDER and JUDGMENT.

Dated: Uniondale, New York
November 16, 1994

/s/ Thomas C. Platt
Hon. Thomas C. Platt
United States District Judge

APPENDIX C

TRANSCRIPT OF PROCEEDINGS
OCTOBER 28, 1994

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

SSC CORP.

Plaintiff,

-against-

TOWN OF SMITHTOWN, TOWN BOARD OF THE TOWN OF SMITHTOWN, and PATRICK VECCHIO, Supervisor, TOWN OF SMITHTOWN,

Defendants.

Civ. Act No.
94 Civ. 1992 (TCP)

TRANSCRIPT OF MOTION
October 28, 1994

11:00 o'clock a.m.

BEFORE: HONORABLE THOMAS C. PLATT,
Chief United States District Judge

APPEARANCES:

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COURTROOM DEPUTY: SSC Corp. Versus Town of Smithtown.

THE COURT: Gentleman, I'm a chicken. Either that or I am Judge Knapp, whose famous comment was "why should you be concerned what I say since this case is going to the Court of Appeals anyway?" Why don't I say I have accepted your stipulated facts. I am convinced I my own mind that the *Carbone* case controls. You submit a judgment, and you take it up to the real power here, where you are going anyway, and leave it at that. I don't see any valid distinction between this situation. It is really not for me to determine that. If you are going to try jurisdiction, you would have to persuade the Court of Appeals or the Supreme Court on that. It would save a lot of time and a lot of effort. I read it. When I first read it, I figured this was dispositive. When I looked it over again in the last 24 hours, I think it is dispositive, and that is it.

MR. FRIEDMAN: That is fine with me.

THE COURT: I am sure that it is fine with you. To deny the defendants' motion and grant your motion. You got the stipulated facts, it's a question of law. You take it up.

MR. CAHILL: Is that the Court's feeling on the contract issue as well?

THE COURT: Yes, it is. That is my decision. Let's not waste anymore time. If you want to, submit a judgment.

MR. FRIEDMAN: Fine, Your Honor.

THE COURT: Denying the defendants' motion and granting yours, and incorporating the stipulated facts on the basis of the *Carbone* case. I don't know how you can get much clearer than that.

MR. CAHILL: Our position is that this was an exception to that.

THE COURT: I don't think so. Good-bye.

MR. FRIEDMAN: Thank you, Your Honor.

MR. SNYDER: Thank you, Your Honor.

MR. CAHILL: Thank you, Your Honor

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(135378)

Supreme Court, U.S.
FILED
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No. 95-782

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

SSC CORP.,
Petitioner,
v.
TOWN OF SMITHTOWN, TOWN BOARD OF THE TOWN OF SMITHTOWN, and PATRICK VECCHIO, Supervisor, TOWN OF SMITHTOWN,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR AMICUS CURIAE NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION IN SUPPORT OF PETITIONER

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IN THE

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OCTOBER TERM, 1995

No. 95-782

SSC CORP.,

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF FOR AMICUS CURIAE NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS CURIAE

This National Solid Wastes Management Association ("NSWMA") is a not-for-profit trade association whose 1300 member companies operate in virtually all 50 states and are engaged in the full spectrum of solid waste management services. NSWMA's members include collectors and transporters of solid waste, operators of solid waste treatment, storage, and disposal facilities, waste recyclers, manufacturers and distributors of waste management equipment, and firms providing legal, financial,

and consulting services to the solid waste management industry. Most of these entities participate in one way or another in the movement of waste in interstate commerce.[1]

NSWMA represents the interests of the waste management industry in judicial, legislative, and administrative forums. One threat to which the industry is perpetually subject is state and local efforts to prevent the interstate movement of waste for storage, treatment, disposal, or recycling. Accordingly, the NSWMA has a strong interest in presenting the views of its membership on the constitutionality of the flow control scheme at issue in this case.

SUMMARY OF ARGUMENT

This is one of a series of cases, arising in the aftermath of this Court's decision in *C & A Carbone, Inc. v. Town of Clarkstown*, 114 S. Ct. 1677 (1994) ("*Carbone*"), in which the Courts of Appeals have been required to address efforts by states or localities to evade *Carbone* by various methods designed to insure that waste continues to be funneled to local disposal facilities. A few courts have properly recognized that, whatever the means chosen, such efforts violate the Commerce Clause if their design and effort is to hoard the waste and the demand to get rid of it for the local facility.[2] Others, unfortunately, have upheld such evasions on various rationales, and in so doing have given strong encouragement—and

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[1] All of the parties in this case granted their consent to this amicus brief as reflected in letters filed with the Clerk of the Court.

[2] *See, e.g., Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders*, 48 F.3d 701 (3d Cir. 1995); *Waste Recycling, Inc. v. Southeast Ala. Solid Waste Disposal Auth.*, 29 F.3d 641 (11th Cir. 1994), *aff'g* 814 F. Supp. 1566 (M.D. Ala. 1993).

indeed provided a road map—to localities seeking to retain their protectionist flow control practices.[3]

Review by this Court is urgently needed to insure that this course of conduct, with its pernicious effects on interstate commerce, does not continue. It seems certain that, absent intervention by this Court, localities—emboldened by decisions such as this—will continue efforts to block the flow of waste beyond their borders. Flow control is a nationwide phenomenon. At the time this Court handed down its opinion in *Carbone*, approximately 43 states had authorized local governments to institute flow control ordinances.[4] The waste handling and disposal facilities those ordinances were designed to protect cost millions to build and receive millions in revenues.[5] Because of the huge economic stakes involved, it is inevitable that numerous localities, such as Smithtown here, will continue to seek to devise waste management plans that modify the form of their waste flow regimes without altering their substance.

This case, and the companion decision issued by the Second Circuit the same day in *A.A. & M. Carting and USA Recycling, Inc. v. Town of Babylon*, 66 F.3d 1272—which will also be before this Court on petition for certiorari within the next few weeks[6]—are an ideal vehicle

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[3] In addition to the instant case, *see, e.g., USA Recycling, Inc. v. Town of Babylon*, 66 F.3d 1272, 1282-83, 1289 (2d Cir. 1995); *Harvey & Harvey, Inc. v. County of Chester*, 68 F.3d 788 (3d Cir. 1995).

[4] *House Comm. on Energy & Commerce, State Control of Management of Municipal Solid Waste*, H.R. Rep. No. 738, 103d Cong., 2d Sess. 7 (1994).

[5] *See* Sidney M. Wolf, *The Solid Waste Crisis: Flow Control and the Commerce Clause*, 39 S.D. L. Rev. 529, 567 (1994).

[6] The Plaintiffs in *A.A. & M. Carting* filed a petition for rehearing and suggestion for rehearing in banc with the Second Circuit, which was not acted upon until November 1, 1995. For that reason, the petition for certiorari in that case is not due until January 30,

for providing the Courts of Appeals with needed guidance. Together, these Second Circuit cases present two alternate techniques that can readily be used by other localities seeking to perpetuate their flow control regimes—a contractual restriction that requires haulers to take waste to a designated facility (in this case) and a more complex scheme that combines regulatory restrictions and financial manipulations to accomplish the same end (in *A.A. & M.*). In both instances, the Second Circuit relied on the so-called "market participant" doctrine to justify the town's discrimination against interstate commerce—a doctrine with which other Courts of Appeals have expressed marked confusion.

ARGUMENT

I. LOWER COURTS ARE VALIDATING THE EFFORTS OF LOCALITIES TO EVADE THIS COURT'S DECISION IN *CARBONE*

State and local laws restricting the free movement of trash in interstate commerce have proved to be a particularly nettlesome subject requiring repeated attention by this Court. Over seventeen years ago, the Court ruled that trash is entitled to the protection of the Commerce Clause and that state or local laws restricting the *import* of trash constitute a discrimination against interstate commerce that is virtually *per se* invalid. *See City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978). The law laid down in *City of Philadelphia* seemed clear. Yet in its aftermath the Court on three separate occisions was forced to confront local schemes—upheld by the lower courts—designed to continue to discourage the import of out-of-state waste. In each instance, the Court found that the newly devised scheme likewise unconstitutionally discriminated against interstate commerce. *Oregon Waste*

1996. NSWMA has been advised by counsel for *A.A. & M.* that a petition for certiorari will be filed on or before that date.

Systems, Inc. v. Department of Envtl. Quality, 114 S. Ct. 1345 (1994); *Chemical Waste Management, Inc. v. Hunt*, 112 S. Ct. 2009 (1992); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, 504 U.S. 353 (1992).

Carbone was the first case to address the constitutionality of a local law designed to prohibit the *export* of trash to out-of-state points. This Court's ruling was again unequivocal—such a law is "just one more instance of local processing requirements that we long have held invalid." *Carbone*, 114 S. Ct. at 1682. Because the "design and effect" of the ordinance was to "hoard[] solid waste, and the demand to get rid of it, for the benefit of the preferred processing facility," *id.* at 1683, the export restraint was held to be a discrimination against interstate commerce.

Just as before, however, localities are devising means to avoid this Court's Commerce Clause teachings, this time embodied in *Carbone*. And, as the Second Circuit's decision demonstrates, these efforts, just as before, are striking a responsive, and indeed, far more dangerous chord in the lower courts. The decision below stands for a totally insupportable proposition in Commerce Clause jurisprudence—that a town can accomplish by contract what by ordinance is unconstitutional. The Second Circuit conceded that Smithtown's "flow control" ordinance, requiring all garbage to be taken to a favored facility, was flatly unconstitutional under *Carbone*. (Pet. App. at 6A.) Nonetheless, it upheld a contract which required all haulers to take garbage to that same facility. (*Id.*) If this sort of facile evasion is countenanced, this Court's *Carbone* decision will become a dead letter.

NSWMA submits that the lower court's conclusion is plainly wrong. This Court has repeatedly rejected the argument that under the Commerce Clause a local government may do indirectly what it cannot do directly. Indeed, the point was reemphasized only a few weeks after *Carbone* was decided:

> Commerce Clause jurisprudence is not so rigid as to be controlled by the form by which a State erects barriers to commerce. . . . *"The commerce clause forbids discrimination, whether forthright or ingenious.* In each case it is our duty to determine whether the statute under attack, whatever, its name may be, will in its *practical operation* work discrimination against interstate commerce."

West Lynn Creamery, Inc. v. Healy, 114 S. Ct. 2205, 2215-16 (1994) (quoting *Best & Co. v. Maxwell*, 311 U.S. 454, 455-56 (1940) (emphasis added)). *West Lynn Creamery* also dramatically illustrates another dictate that the Second Circuit declined to follow. The lower court examined Smithtown's scheme piece-by-piece rather than as a whole. "Smithtown is a 'major participant' in two 'discrete, identifiable class[es] of economic activity': waste collection and waste disposal." (Pet. App. at 27A.) The Second Circuit then concluded that Smithtown's actions in each of the two markets was lawful, on separate—and indeed inconsistent—rationales. (*Id.* at 29a-31a.) But this Court explicitly rejected this component-by-component approach in *West Lynn Creamery*, 114 S. Ct. at 2215, instead requiring that "the constitutionality of the program as a whole" be scrutinized.

Nor is the decision below merely an isolated "wrong" decision. Other cases likewise have upheld local schemes devised to perpetuate the very practice struck down in *Carbone*—the hoarding of trash and the demand for disposal services for a favored local facility. Thus the Second Circuit, in the companion *A.A.&M.* case, also carved up a complex flow control scheme into its "component" parts. After examining each "component" in isolation, the court upheld the scheme as a whole on the theory that the admittedly regulatory components did not discriminate against interstate commerce, and that those components that plainly funneled trash to a local facility

constituted "market participation" and thus were not subject to the Commerce Clause.

The Third Circuit also adopted a crabbed interpretation of *Carbone* in *Harvey & Harvey, Inc. v. County of Chester*, 68 F.3d 788 (3d Cir. 1995) when it addressed two separate Commerce Clause challenges to municipal "flow control" plans. In addressing the constitutionality of these schemes, the Third Circuit focused on "the process of selecting waste service providers rather than on the effect of the regulation once a provider or providers have been chosen." *Id.* at 802. The court concluded that as long as the selection process for the favored facility is open and competitive to in- and out-of-state businesses, there is no Commerce Clause violation. *Id.* The Third Circuit simply grafted this "process" focus onto Commerce Clause analysis in order to avoid *Carbone's* reach. Indeed, it conceded: "we cannot cite any authority for th[is] sort of inquiry." *Id. Carbone*, of course never mentions "process"; instead it stresses that the focus must be on the "design and *effect*" of the challenged scheme. *Carbone*, 114 S. Ct. at 1683 (emphasis added).

The road maps laid out by the decision below and the other decisions upholding various techniques for evading *Carbone* are certain to be followed by states and localities across the nation. The flow control ordinances that proliferated within the past decade were motivated by simple economic self-interest on the part of local governments: having undertaking various forms of financial commitments to local waste facilities, local governments have a strong interest in insuring that all trash in the town goes to their facility, *see Carbone*, 114 S. Ct. at 1684 ("flow control ordinance is a financing measure").[7]

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[7] *See also* U.S. Environmental Protection Agency, *The Solid Waste Dilemma: An Agenda for Action (Background Documents)* 8.B-2 (Sept. 1988); Eric S. Petersen & David N. Abramowitz, *Municipal Solid Waste Flow Control in the Post-Carbone World*,

Compliance with *Carbone* means that those localities will now have to compete for trash with out-of-town and out-of-state facilities. And to do so, these facilities may be forced to lower their prices—which may well require the town to make good on the financial guarantees to the facility. Meeting these commitments "through general taxes or municipal bonds," as this Court suggested in *Carbone, id.*, is likely to be politically unpopular. Thus there are strong economic and political incentives for local governments to seize upon any opening created by the Courts of Appeals to perpetuate their flow control regimes. This practical consequence underlines the importance of prompt consideration of this issue by this Court.

II. REVIEW BY THIS COURT IS NEEDED TO CLARIFY THE LIMITS OF THE "MARKET PARTICIPANT" DOCTRINE

In both this case and the companion *A.A.& M./USA Recycling* case, the Court below upheld the flow control scheme at issue by reliance on the so-called "market participant" doctrine. In so doing, it has stretched that doctrine far beyond any plausible limits, creating an exemption that threatens to swallow the rule prohibiting discrimination against interstate commerce.

This Court itself has recognized that the "precise contours of the market-participant doctrine"—which have been addressed by this Court in only five cases—"have yet to be established." *South-Central Timber Dev., Inc. v. Wunnicke,* 467 U.S. 82, 93 (1984). And a number of federal courts of appeals have expressed their uncertainty as to the application of that doctrine to a variety of factual circumstances. *See, e.g., GSW, Inc. v. Long County,* 999

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22 Fordham Urb. L. J. 361 (Winter, 1995); Kelly Outten, Note, *Waste to Energy: Environmental and Local Government Concerns,* 19 U. Rich. L. Rev. 373, 392 (1985).

F.2d 1508, 1511 (11th Cir. 1993) ("market participant doctrine . . . is a relatively new and difficult area of the Supreme Court's jurisprudence"); *Big Country Foods, Inc. v. Board of Educ.*, 952 F.2d 1173, 1178 (9th Cir. 1992) ("line between state market participation and state regulation is a fuzzy one that has perplexed courts and commentators alike"); *Swin Resource Sys., Inc. v. Lycoming County*, 883 F.2d 245, 249 (3d Cir. 1989) ("[a]pplication of the distinction between 'market participant' and 'market regulator' has . . . occasioned considerable dispute"), *cert. denied*, 493 U.S. 1077 (1990). Given the nationwide importance of solid waste flow control, and the pivotal importance of the market participant doctrine in the Second Circuit's analysis, this Court should grant certiorari in order to clarify the relationship of that doctrine to general Commerce Clause jurisprudence.

The basic thrust of the market participant doctrine seems straightforward: it permits a locality to discriminate, under certain circumstances, in favor of its own residents when it purchases goods,[8] sells goods[9] or hires workers.[10] The rationale is that when the government participates in the marketplace like any private business, it has the prerogative to choose with whom it will deal, just as a private business might do.

The Second Circuit, however, has improperly expanded the "market participant" doctrine to condone a town doing what no private company could do—use its regulatory power to effectively compel the use of a designated local disposal facility by all generators of waste. Smithtown, of course, does not just impose conditions on the collection and disposal of waste generated by the town

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[8] *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976); *Wyoming v. Oklahoma*, 502 U.S. 437 (1992).

[9] *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980).

[10] *White v. Massachusetts Council of Constr. Employers*, 460 U.S. 204 (1983).

itself—*i.e.*, by the City Hall, the town jail and other town buildings—which, as a purchaser of waste collection and disposal services, it could properly do. Rather, through the use of its regulatory powers, Smithtown has compelled its citizens, through SSC, to utilize the local disposal facility. This makes Smithtown a "market regulator," not a "market participant."

The four cases in which the Supreme Court has recognized the market participant doctrine—*Reeves, Alexandria Scrap, White,* and *Wyoming*—all involved a local government's right to deal voluntarily with whom it wanted, *not* to *compel* third parties to deal only with the local governments. Thus, *Reeves* concluded that South Dakota could sell cement it manufactured only to South Dakota residents. The decision nowhere suggests that South Dakota could require its residents to buy *only* from it. Similarly, *Alexandria Scrap* merely held that, in buying scrap, Maryland could apply more lenient paperwork standards to local residents. It did not hold that Maryland could compel local dealers to sell only to the State. *White* allowed the City of Boston to contract only with contractors that met standards the City thought important; it did not allow Boston to compel the contractors to work for the City. And finally, *Wyoming* allowed an Oklahoma agency purchasing coal to give a preference to local producers; it did not allow Oklahoma to compel those producers to sell only to the State. The Second Circuit has thus extended the market participant doctrine far beyond any point ever recognized by this Court.

Indeed, rather than a "market participant," Smithtown is more properly characterized as a market monopolist. Unlike the other "market participant" cases cited above, the Town has not entered into a commercial transaction in the marketplace alongside private businesses. See *Western Oil & Gas Ass'n v. Cory*, 726 F.2d 1340, 1342-43 (9th Cir. 1984) (declines to apply "market participant" exception since California's Lands Commission had "a

complete monopoly over the sites" being leased; only "state's participation in the marketplace *as a competitor* to be shielded from the Commerce Clause") (emphasis added), *aff'd mem.*, 471 U.S. 81 (1985). Far from subjecting itself to the same restrictions imposed on private businesses in the marketplace—the prime justification for relieving a town of Commerce Clause restraints when it acts as a market participant [11]—Smithtown here has used its regulatory power to create for itself a monopoly in the market it has chosen to enter. The fact that Smithtown's monopoly power was authorized by the state [12] simply confirms the fundamental point—Smithtown is acting in its governmental capacity as a market regulator, not as a

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[11] *Reeves*, 447 U.S. at 439. For example, a private business in the marketplace cannot violate the anti-trust laws. This Court has justified the Commerce Clause immunity of the "market participant" exception by noting that the anti-trust laws apply to states acting as "market participants." *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. at 98-99 (plurality opinion). *See generally* Barton B. Clark, Comment, *Give 'Em Enough Rope: States, Subdivisions and the Market Participant Exception to the Dormant Commerce Clause*, 60 U. Chi. L. Rev. 615, 629 (1993) (recommends that courts look to the anti-trust laws to ensure that states do not abuse their powers in the guise of "market participants"). Yet the court below brushed aside this point, focusing instead on the antitrust immunity granted to Smithtown by the State of New York. (Pet. App. at 32a.)

Although petitioner has not framed this issue in his petition for certiorari, the lower court, in its opinion, also announced that it was "far from clear" that Smithtown's status as a market participant would subject the town to the antitrust laws. To reach this conclusion, the Second Circuit cited to two decisions of this Court, *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978) (plurality opinion) and *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982), that did not involve the "market participant" doctrine at all, while ignoring *South-Central Timber* entirely and according only a "but see" reference to the recent decision in *City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365, 378 (1991), which explicitly refers to "the possible market participant exception" to state-authorized antitrust immunity.

[12] *See* Pet. App. at 31a.

market participant. This action alone should negate any claim of market participant status.

Finally, the decision below conflicts in principle with an Eleventh Circuit opinion, *Waste Recycling, Inc. v. Southeast Ala. Solid Waste Disposal Auth.*, 29 F.3d 641 (11th Cir. 1994), *aff'g* 814 F. Supp. 1566 (M.D. Ala. 1993), whose reasoning the Second Circuit explicitly "decline[d] to adopt." (Pet. App. at 29a.) In *Waste Recycling*, the Eleventh Circuit invalidated a series of municipal contracts and flow control ordinances which mandated that solid waste collected within the municipalities be delivered to a favored facility. The Eleventh Circuit flatly rejected the municipalities' claims that they were "market participants": "[t]he expressed intent behind these contracts and the three representative ordinances based on them is not individual market participation but broad market regulation." 814 F. Supp. at 1572-73. Thus, the Eleventh Circuit but not the Second, has properly understood the limits of the market participant doctrine.

This case (and the companion *A.A. & M./USA Recycling* case) provide a perfect opportunity for this Court to delineate the contours of the "market participant" doctrine. Left on their own, lower courts are abusing that doctrine and, in so doing, are encouraging states and localities to make counterfeit claims of being "market participants" so that they can discriminate against interstate commerce. This Court must step in to keep the "market participant" exception from swallowing the dormant Commerce Clause rule.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted, or at a minimum, held for consideration with *A.A. & M./USA Recycling*.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1995

SSC CORP.,

Petitioner,

vs.

TOWN OF SMITHTOWN, TOWN BOARD OF THE TOWN OF SMITHTOWN and PATRICK VECCHIO, Supervisor, Town of Smithtown,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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QUESTIONS PRESENTED

1. Whether the court below was correct in finding that the Respondents were acting as a market participant in hiring Petitioner to perform waste collection and disposal services in its Improvement, and thereby entitled to specify the terms of its contract with Petitioner.

2. Whether the court below properly refused to review the Petitioner's contract with the Respondents under the dormant aspect of the Commerce Clause, because the creation of the special Improvement district at issue was not challenged below, and therefore, no regulatory act performed by the Respondents in connection with the Improvement was before the Court.

3. Whether a "natural resource" exception to the Market Participant Doctrine exists, and if so, whether solid waste is such a natural resource.

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STATEMENT OF THE CASE

A. Preliminary Statement

In the decision below, the Second Circuit Court of Appeals employed a straightforward application of established constitutional principles to uphold the terms of a publicly bid contract (the "Contract") between Petitioner SSC Corp. ("SSC") and Respondent Town of Smithtown (the "Town"). The Court's decision with regard to the Town's powers to hire contractors to assist it in the provision of municipal services made no new law, and did not constitute an "evasion" of the ruling in *C&A Carbone v. Town of Clarkstown*, __ U.S. __, 114 S. Ct. 1677 (1994), as claimed here by SSC. *Carbone* was not implicated in the Contract dispute between the parties simply because SSC failed to challenge — and indeed stipulated to the propriety of — the initial regulatory act which would have been subject to Commerce Clause analysis: the act creating the Town's Solid Waste Collection and Disposal Improvement.

Two independent municipal actions were undertaken by the Town in 1991-92 to manage its solid waste. It passed a local law (the Code) under its police powers, mandating that all waste generated in the Town, including waste collected under private arrangement from commercial sources and institutions, be delivered to Town designated facilities. Then it separately created, through its taxing power, a special district comprised of identified residential properties (the Solid Waste Collection and Disposal Improvement) to which it assessed charges and provided comprehensive collection and disposal service.

SSC, a waste hauler with commercial customers and alleged relationships with out-of-state landfills, challenged

the Code as an unconstitutional regulation of interstate commerce, citing the court's holding in *C&A Carbone v. Town of Clarkstown*. It was successful in this regard. The Code was struck down by the Court below.

SSC, as the beneficiary of the Town's award of a Contract in the Improvement district, did not challenge the Town's exercise of its taxing power to collect fees and provide waste service to its residents. To the contrary, it stipulated that the exercise of that power, particularly the elimination of other, independent private services, was a valid exercise of municipal power. Instead, SSC was forced to employ the fallacious argument that flaws in the Town's Solid Waste Code somehow undermined the entirely independent creation of the Improvement, giving it the right to disregard the terms of its Contract.

The Court of Appeals easily saw through the smoke and distinguished the two municipal actions. It came to the obvious conclusion that the Town was merely fulfilling its service obligations, and thereby acting as a market participant, when it hired and issued directions to its contractors. The regulatory act occurred earlier, when the Town formed the Improvement, taxed its citizens and undertook to provide the service. SSC did not, and could not, challenge that seminal act without giving up its own privileged position as exclusive contractor in its bid areas.

SSC attempts the same deception here, but in so doing, misstates the holding of the Court below.

B. Misstatements of Fact and Law

In the Statement of Jurisdiction of the Petition (p. 1), SSC claims that "the Court of Appeals upheld, in a final judgment,

a local town ordinance and certain provisions of a Contract issued under that ordinance against a challenge under the dormant Commerce Clause of the Constitution Art. I, Sect. 8, cl. 3," (emphasis added). In fact, the Court of Appeals did not uphold any portion of the ordinance as challenged by SSC, and did not hold that the Improvement Contract was issued pursuant to the ordinance. The two municipal actions were entirely independent and were treated as such throughout the opinion of the Court.

In *Questions Presented #1* (p. i) and throughout the Petition, SSC implies that it has an existing, independent business relationship with individual residents of the Improvement for collection service, and that the Improvement Contract is a device designed to interfere with that relationship by imposing conditions on the conduct of its business. In fact, SSC has no such relationship with residents, but performs services and receives compensation solely for and from the Town. The implication otherwise is a misstatement of the facts.

So, too, is the statement in the Petition at 7-8 that the parties have stipulated that landfills available to SSC charge tipping fees lower than the $65 per ton fee "imposed by the privately owned local incinerator favored by the Town in the Contract." The stipulation by the parties did not state that fees were at any time imposed on SSC by the incinerator operator, and in fact, this is not the case. (See Cross-Petition Appendix B, ¶ 8 at 55a). As the Court of Appeals correctly noted in its decision (Appendix to Petition at 10a-11a), the $65 per ton tipping fee was charged solely by Smithtown as a term of the Contract. SSC paid no disposal fees to any entity but the Town. SSC was not forced to, and in fact did not, enter into any business transaction with Smithtown's incinerator operator. Its mischaracterization of the stipulation is an

attempt to draw a false comparison between Smithtown's Contract and the local ordinance struck down in *Carbone*.

STATEMENT OF FACTS

Smithtown is a political subdivision of the State of New York, located in western Suffolk County on Long Island, with a population of approximately 125,000 persons. It is a suburban community comprised of roughly 32,000 residential households, and is home to a variety of businesses, institutions and industrial enterprises. Roughly 60% of the Town's solid waste is generated by its residences, 40% by commercial and institutional generators.

In 1991, pursuant to Article 3A § 54 of the Town Law of the State of New York (McKinney 1987), the Town established an Improvement for the purpose of providing collection and disposal service to Smithtown's 32,000 residences. Through the Improvement, residential property owners are assessed an annual fee in their property tax bill for garbage service. The assessment, in turn, is based upon the cost of services procured by the Town through publicly bid contracts under N.Y. General Municipal Law § 103 (McKinney 1986).

The Petitioner SSC is a carting firm licensed to collect solid waste in the Town of Smithtown. The Town prepared and solicited bids for service in the Improvement in November 1991. SSC was low bidder on and was awarded 7 of the 10 contracts, covering an area containing approximately 21,000 residences, in December 1991. Work commenced in January 1992.

The Improvement Contract, in § 1.04, required that waste collected in the Improvement be delivered to facilities designated by the Town. The Contract provided that title to

waste set out at curbside for collection in the Improvement would lie in the Town, and not the contractor. Smithtown had previously secured access to the Huntington Resource Recovery Facility (the "HRRF") for disposal of household garbage, and operated another Town facility for recyclables, bulk items and grass. The Improvement contractor paid a waste disposal fee to the Town which was reimbursed through the compensation agreed upon in the bid price. SSC's bid for its Contracts included a specific disposal cost component of $92.40 per home per year, utilizing the Town's previously specified "tipping fee" of $65 per ton.

The Contract was structured so that funds for both collection and disposal costs would be received from the households in the Improvement, then passed through to the contractor who would retain collection payments but return disposal costs to the Town in the form of tipping fees. This mechanism was employed to identify the disposal component of the bid price, so that disposal compensation could be adjusted up or down in the event of a change in tipping fees, to discourage the disposal of non-contract waste (*i.e.*, waste generated outside of the contractor's bid area) under the Contract, and to encourage the separation of recyclables from other waste at curbside. (*Smithtown*, SSC Petition at 28a-29a). In April 1994, the Town Board of Smithtown, after an investigation, determined that SSC had breached its Contract by diverting waste to disposal facilities other than those designated in the Contract, presumably for a lower price, while keeping the Contract payments earmarked for disposal costs. The Town's investigation included surveillance of SSC vehicles collecting waste at Contract residences, leaving the Contract area, and delivering their loads to SSC's transfer station for ultimate disposal at unknown locations. The Board authorized the Town Attorney to take legal action to recover $700,000 in Contract payments to SSC, representing disposal

fees for over 9,000 tons of waste diverted to unknown facilities.

The Town's counterclaim against SSC in the District Court alleged as well that at the time it submitted bids, SSC intended to divert Contract waste to other, cheaper disposal facilities, thereby allowing it to underbid its competitors, secure the Contract and defraud the bidding process.

REASONS FOR DENYING THE WRIT

I.

THE MARKET PARTICIPANT DOCTRINE WAS PROPERLY APPLIED TO THE IMPROVEMENT CONTRACT.

A. Municipalities Are Direct Providers of Services And Therefore Market Participants in Special Improvement Districts.

Smithtown's creation of its Solid Waste Collection and Disposal Improvement was by no means a unique or unconventional use of home rule power. The use of districts to provide and pay for local public services is common throughout the State of New York. The State legislature has generally authorized police, fire, water, sewer, highway and waste districts for all local municipalities, while specifically authorizing particular districts for ambulance services and even the disposal of duck waste in Suffolk County.[1]

Here the Solid Waste Collection and Disposal

1. Police Districts are authorized under N.Y. Town Law Article 10, Fire Districts under Article 11, Water, Sewer, Waste and other districts under Articles 12 and 12A, duck waste pursuant to § 198-a.

Improvement was created, and the Contract authorized, under N.Y. Town Law Article 3-A § 54 (McKinney 1987), which governs the creation of special service districts and the means to assess charges to the residents thereof.

The special district approach to public services allows geographic and financial specificity. Either the whole or something less than the whole of a municipal jurisdiction may be served, while the charges assessed to members of the district can be identified on the property tax bill as going to a particular purpose. In New York, districts and Improvement areas are created by act of the local legislature, subject to a permissive referendum by the taxpayers in the district.

Here, the public interest was twofold: providing reliable and efficient removal of waste from residential households, coupled with safe, secure and *identified* means of disposal. The public policy adopted by Smithtown was to provide those distinct though related services to residential properties through the government, financed through assessments upon real property.

The provision of services through the device of a special assessment district is unquestionably a public undertaking.

> [A]ny improvement constructed, acquired or provided pursuant to this section shall be a *town function* and the town board shall be responsible for the necessary maintenance, operation and repair thereof.

N.Y. Town Law § 54.12 (McKinney 1987) (emphasis added).

However, the Town may lawfully hire outside contractors to assist it in the provision of all or part of these services (*see*

N.Y. Town Law §§ 54.7, 197, authorizing the manner in which contracts shall be let for the performance of the work). Its powers include the *ability to choose* the manner of collection, as well as the place and method of disposal for Improvement waste. It could elect, under Town Law § 54, to perform the work with municipal employees. Whether it employs its own workers, or hires labor and equipment from firms such as SSC, it provides the service under a lawful arrangement with the residents of the Improvement. The Town's taxing power provides payment for both collection and disposal from those whom it serves.

Consequently, the Town has directly entered the market of providing waste services to the residents of the Improvement, contrary to SSC's contention in the Petition (at 17), that the Town "is merely a consumer of services which are performed by an independent private party." The suggestion made by SSC that the Market Participant Doctrine, as developed in *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 96 S. Ct. 2488 (1976), *Reeves, Inc. v. Stake*, 447 U.S. 429, 100 S. Ct. 2271 (1980) and *White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204, 103 S. Ct. 1042 (1983), is applicable to cases where the government is a buyer or seller of goods, or an employer, but *not* to the hiring of waste collection or disposal services, is simply absurd. SSC, far more directly than the Boston construction workers in *White*, is employed by, and under contract with, Smithtown. There is no need to construe SSC as "substantially if informally working for the city" (*White*, at n.7), when its Contract was quite formally bid upon and awarded.

Moreover, the consumption of services directly performed by private parties *does* entitle a municipality to market participant status when those services are provided locally and their purchase is challenged by out-of-state

competitors. A government may choose a local telephone service for its offices, a local lawyer to represent it, or a local car dealer from whom to purchase and service its vehicles, simply because it prefers to "restrict its trade to its own citizens or businesses." *Alexandria Scrap*, 426 U.S. at 808, 96 S. Ct. at 2497. Such choices of local over interstate services are made by government procurement offices every day.

B. The Town's Regulatory Act In Creating The Improvement Is Not Before the Court.

Prior to the formation of the Improvement, Smithtown's residences purchased waste collection and disposal services on an individual basis from licensed waste haulers such as SSC. The creation of the Improvement destroyed those private arrangements, denying access to the local residential waste service market to all private service providers, except those who, like SSC, have secured contracts to work for the Town.

The question of whether the formation of an Improvement district for the provision of waste services is prohibited by the dormant Commerce Clause, in light of this Court's ruling in *C&A Carbone v. Town of Clarkstown*, __ U.S. __, 114 S. Ct. 1677 (1994), was addressed by the Second Circuit in its decision in the companion cases to this matter, *A. A. & M. Carting Service Inc. v. Town of Babylon* and *USA Recycling, Inc. v. Town of Babylon*, 66 F.3d 1272 (2d Cir. 1995), (hereinafter "*Babylon*"), (decision annexed to the Cross-Petition in Appendix A at 1a-52a). There, the Town of Babylon, Smithtown's southerly neighbor, created an Improvement district under the same authorizing legislation, Town Law § 54, and took over the collection market for commercial waste, awarding a contract to a single firm to provide that service throughout the Town. The Court found that the total elimination of all private waste collection

activity, caused by the formation of Babylon's Improvement district, constituted regulation of the private market, not participation in it. (*Babylon*, Cross Petition at 21a).

Applying the traditional Commerce Clause analysis set forth in *Carbone, Oregon Waste Systems Inc. v. Department of Environmental Quality*, __U.S. __, 114 S. Ct. 1345 (1994) and *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S. Ct. 844 (1970), the Court of Appeals found that the total elimination of a private market did not discriminate against or impose undue burdens upon interstate commerce. (*Babylon*, Cross Petition at 22a). In so doing, the Court rejected the plaintiff carters' contention that the *Carbone* case had created a sweeping new limitation on the power of local governments to provide sanitation service to local residents and businesses where that service was provided on an exclusive basis and financed by local tax dollars.

The Court then went on to address the carters' challenge to the award of Babylon's contract to the so-called "favored" collection firm and the question of Babylon's relationship with its own incinerator operator.[2] With respect to these contracts, the Court found that Babylon was acting as a market participant in buying collection services from one and disposal services from the other. As such, it had the right to negotiate such terms as it deemed appropriate and to offer capacity at its incinerator to its collection firm at no charge. In finding market participation in these transactions, the Court made reference to its decision in *SSC Corp. v. Town of Smithtown*. (*Babylon*, Cross-Petition at 34a-36a, 41a-42a).

In the view of the Second Circuit Court of Appeals, it is

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2. Both Babylon and Smithtown have contracts with local subsidiaries of Ogden Martin Systems, Inc. a national supplier-builder and operator of mass-burn waste-to-energy systems.

the creation of an Improvement district in the first instance which eliminates private transactions and constitutes regulatory activity. Once having assumed the duty of providing solid waste services by eliminating the private market, the *fulfillment* of that duty is done by the municipality as a market participant. It must purchase or hire the services of men and equipment, fuel, insurance and sundry other items. As noted above, a municipality may perform its duty with the aid of outside contractors and it may freely define the scope of work of those contractors in the course of that procurement.

The critical difference between the *Smithtown* and *Babylon* cases, and the circumstance which makes the Commerce Clause analysis of *Carbone* inapposite here, is that SSC failed to challenge the only act by which Smithtown regulated the private market for residential waste collection — the formation of the Improvement. (*Smithtown*, SSC Petition at 11a, n.15). SSC had good reason for its failure to raise the challenge. To challenge the right of the Town to form the Improvement would be to sacrifice its own privileged position as recipient of the service Contract.

Instead, it advanced the unfounded notion that *Carbone* somehow vested waste haulers with an inalienable right to determine the means of disposal of the waste they are hired to haul. SSC claimed the power, not only to defy the direction of its customer the Town, but to speculate with the Town's tax dollars on the spot waste disposal market. The Court below properly refused to recognize such a right.

It may be presumed that the Court of Appeals would have come to the same conclusion on the formation of Smithtown's Improvement as it did with Babylon's — that it was regulation, but evenhanded regulation and not violative of the Commerce Clause. Nevertheless, the only question with

which the Court was presented in *Smithtown* was whether the Town, concededly in the fulfillment of a governmental duty, may properly direct its outside contractors to perform work to the same specifications as the Town's own employees. Under *White*, the answer is an unequivocal yes. Because the regulatory act which eliminated private service arrangements in the Improvement was not challenged below, that act is not presented to this Court for review in this case.

C. The Improvement Contract Imposes No Unconstitutional Condition Upon SSC.

Insofar as it challenges the Town's powers to specify the services performed in the Improvement, SSC claims that the Contract provision requiring delivery of waste to a facility selected by the Town is a mere condition, voidable under a line of cases articulating the doctrine of unconstitutional conditions, citing *Perry v. Sinderman*, 408 U.S. 593, 92 S. Ct. 2694 (1972); *Pickering v. Board of Education of Township High School District 205*, 391 U.S. 563, 88 S. Ct. 1731 (1968) and *Dolan v. City of Tigard*, __ U.S. __, 114 S. Ct. 2309 (1994).

All of SSC's rights to perform any service in its bid areas flow solely from the Town through the Contract. SSC has no privity of contract with any individual household which would allow it to collect, transport or dispose of Improvement waste on an independent basis.

The doctrine of unconstitutional conditions stands for the proposition that the government may not fetter the grant of particular benefits with the recipient's relinquishment of an independent right. Thus, the government may not condition school employment upon the teachers' relinquishment of their First Amendment rights to criticize school policy or budgets or

to utter "seditious" speech. *Perry v. Sinderman*, 408 U.S. 593, 92 S. Ct. 2694 (1972). Nor may it require a private trucker to register as a common carrier in order to obtain a certificate to use state highways, *Frost & Frost Trucking Co. v. Railroad Commission of California*, 271 U.S. 583, 46 S. Ct. 605 (1926), or condition a permit for land development upon dedication of a portion of that land to the government. *Dolan v. City of Tigard*, __ U.S. __, 114 S. Ct. 2309 (1994); *Parks v. Watson*, 716 F.2d 646 (9th Cir. 1983).

What distinguishes these cases from the matter at hand is that in each, the government sought to impose a condition *unrelated* to the main business sought to be done by the claimant. Thus, if the unconstitutional condition is lifted, the teacher continues to teach, the trucker to use the highways and the developer to build, subject to *reasonable* conditions related to the subject. *Perry* protects a teacher's right to criticize school policy. It does not license a Math teacher to unilaterally decide to teach English instead.

Here, SSC has no independent right which was surrendered by executing the Contract. It cannot collect or dispose of waste unless someone hires it to do so. In the Improvement, only the Town has hired it. In the Town's Contract, the place and method of disposal is a central objective, not a collateral condition.

SSC's misreading of *Carbone*, *Perry* and *Dolan* would not only leave it without competition from other private haulers in its bid areas, but steal from the taxpayers the exclusive power to choose the means of disposal for residential waste, without any degree of accountability to the public or any indemnity from the consequences of unlawful disposal.

The Court of Appeals correctly held it to the terms of its bargain.

II.

NO RECOGNIZED LIMITATIONS TO THE MARKET PARTICIPANT DOCTRINE ARE APPLICABLE TO THE SMITHTOWN IMPROVEMENT CONTRACT.

A. Solid Waste is not a Natural Resource.

Solid waste is a manmade phenomenon. The successive waves of immigrant humankind to set foot on the North American continent were not drawn here by the rotting heaps of garbage, junked cars, and industrial waste which now speckle our landscape. Garbage may, under the right circumstances, be a "resource" but there is nothing natural about it. In fact, to the extent it has a "natural" state, it is a noxious substance posing an immediate threat to the public health.

For this reason, people pay for services to remove and dispose of solid waste, and indeed governments on every level require that collection and disposal be performed safely. It is these services, as this Court has recognized, not the noxious object of their attention, which are the articles of commerce protected by the Constitution. *Carbone,* 114 S. Ct. at 1682.

The appellant substantially bases its arguments on two spurious contentions — that household trash is a "natural resource," and that the Market Participant Doctrine has no application to natural resources. As discussed below, each of these assertions is wholly meritless.

B. Household Trash Is Not A Natural Resource.

SSC's contention that the household refuse of the citizens of Smithtown is a natural resource is counterintuitive and flies in the face of the accepted definition of the term. *Blacks's Law Dictionary* (Rev. 4th Ed. 1968) defines "natural resource":

> The term includes not only timber, gas, oil, coal, minerals, lakes, and submerged lands, but also, features which supply a human need and contribute to the health, welfare, and benefit of a community, and are essential to the well-being thereof and proper enjoyment of property devoted to park and recreational purposes.

As is plain, not only is garbage not listed as an example of such resources, it is not, by any stretch, *ejusdem generis*. Indeed, trash is the very antithesis of the defining elements that natural resources "supply a human need and contribute to the health, welfare, and benefit of a community, and are essential to the well-being thereof." Furthermore, implicit in the term is the notion that the resource be found in nature, a quality distinctly lacking here.

Nor does SSC's fanciful position comport with this Court's take on natural resources. In *Reeves, Inc. v. Stake*, 447 U.S. 429, 443, 100 S. Ct. 2271, 2281 (1980), the Court observed that, "Cement is not a natural resource, like coal, timber, wild game, or minerals" [internal citations omitted] or like "minnows," "landfill sites" or "natural gas." "It is the end product of a complex process whereby a costly physical plant and human labor act on raw materials." *Reeves*, 447 U.S. at 444, 100 S. Ct. at 2281.

For the same reasons, refuse is not a natural resource. Here, the solid waste claimed to be a natural resource is to a very substantial degree a byproduct of "complex process[es]" in the initial manufacture and processing of the countless modern products that comprise today's refuse. In particular, the materials and energy end products to be derived from it are doubly removed from the realm of nature, as they are then further subjected to the modern and technologically-advanced reclamation, recycling and waste combustion "complex process[es]" that require "a costly physical plant" (the HRRF) and extensive "human labor act[ing] on the raw materials."

SSC's citation (Petition at 4) to *C&A Carbone v. Town of Clarkstown*, __ U.S. __, 114 S. Ct. 1677, 1682-83 (1994), is inapposite, if not misleading, insofar as the Court merely used the term "local resource," not "natural resource," and was merely referring to the resources' geographical location, not to any innate characteristics. Further, the Court's point of reference there was its earlier line of decisions dealing with meat, shrimp, oyster, cantaloupes and timber as articles of commerce. Thus, the relevant inquiry is whether the Commerce Clause is implicated because the state's action affects an article of commerce.[3] *See Sporhase v. Nebraska*, 458 U.S. 941, 951, 102 S. Ct. 3456, 3463 (1982), (rejecting claim that groundwater is not an article of commerce).

Moreover, the "essential vice" of the various laws that the Court had struck down in those earlier cases "is that they bar the import of the processing service." *Carbone*, 114 S. Ct. at 1683. Similarly, with respect to the facts in *Carbone*, the Court

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3. SSC's citations (Petition at 18) to *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923) and *West v. Kansas Natural Gas*, 221 U.S. 229 (1911), merely state the obvious — that natural resources such as natural gas are articles of commerce subject to the dormant Commerce Clause.

observed, "the article of commerce is not so much the solid waste itself, but rather the service of processing and disposing of it." *Carbone*, 114 S. Ct. at 1682. Thus, the statement that "this Court clearly considered solid waste to be a natural resource" (Petition at 4), is belied by the *Carbone* text.

The Petitioner's aberrant view is not buttressed by the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C.A. § 6901 *et seq.* That § 6901(c) and § 6901(d) state, respectively, that recoverable materials exist within solid waste and that solid waste represents a potential fuel source does not convert the polytypical mixture of plastics, lubricants, pharmaceuticals, foodstuffs, paper, metals and fibers found in the average homeowner's garbage pail into a natural resource. By this definition virtually anything — from discarded refrigerators to yesterday's leftover Wheaties — would fall under the rubric "natural resource" and render the definition meaningless.

The Petitioner's citation to Federal Trade Commission rule 58 Fed. Reg. 41356, 41358 (August 3, 1993) (Petition at 19-20), actually undermines its position, since the Rule points out that the "majority of methanol produced in the U.S. is from natural gas resources, but it can also be produced from coal, residual oil, and biomass . . .," thus differentiating between the two classes of sources — one found naturally, the other not.

C. There Is No Natural Resources Exception To The Market Participant Doctrine.

The only authority, *Reeves, Inc. v. Stake*, 447 U.S. at 443-44, cited by SSC for the proposition that "[a]n important exception to the Market Participant Doctrine exists where the state is dealing with a natural resource" (Petition at 18), upon

examination is something less than claimed. *Reeves,* in *dictum*, noted that "whatever limits might exist on a State's ability to invoke the *Alexandria Scrap* exemption to hoard resources which by happenstance are found there, those limits do not apply here." 447 U.S. at 444, 100 S. Ct. at 2281. However, this Court has not determined that any article of commerce is, *per se*, subject to different treatment under the Commerce Clause.

In *South-Central Timber Development, Inc. v. Wunnicke,* 467 U.S. 82, 104 S. Ct. 2237 (1984), the Court was presented with a case involving Alaskan timber, undeniably a natural resource, and the Market Participant Doctrine. If, as postulated by SSC, a natural resource exception to the Market Participant Doctrine exists under *Reeves,* the Court's analysis of the application of the doctrine would have ended upon determining timber to be a natural resource. Instead, the Court engaged in a lengthy discussion of its line of market participant decisions, the relevant market, common law restraints on alienation, vertical restraints and downstream effects on commerce. *South-Central Timber,* 467 U.S. at 91-99, 104 S. Ct. at 2242-2246. These issues would have been academic if the purported natural resource exception existed and was applied at the threshold.

While "[t]he precise contours of the market-participant doctrine have yet to be established," *South-Central Timber,* 447 U.S. at 93, 104 S. Ct. at 2243, no natural resource exception to the doctrine has yet been articulated by the Court. To the contrary, this Court has categorically stated:

> Our cases make clear that if a State is acting as market participant, rather than as a market regulator, the dormant Commerce Clause places no limitation on its activities.

Id. Accordingly, the Petitioner's ersatz exception must be disregarded.

D. No Downstream Market is Regulated by the Improvement Contract.

Petitioner refers the Court to the limitations on the Market Participant Doctrine discussed in *South Central Timber Development Inc. v. Wunnicke*, 467 U.S. 82, 104 S. Ct. 2237 (1984), with respect to the concept of "downstream" market regulation. *South-Central Timber* involved a sale by the State of Alaska of a quantity of timber to private buyers. Alaska placed a condition on the sale that after the timber had been delivered, the buyers were required to process it to some degree at sawmills in Alaska, as opposed to the mills of the buyers' choice. The plurality opinion in that decision held that while Alaska was a market participant in the timber market with respect to the immediate transaction, its attempt to impose post-sale requirements on the buyers constituted regulation of the "downstream" processing market in which it was not a participant.

The distinguishing feature in Smithtown's Improvement Contract is that the Town did not sell, and SSC did not buy, any rights to do anything in the Improvement except transport waste from the homes of the residents to the incinerator (or other facility) whose services the Town had separately purchased for use in disposal. The only conceivable "downstream transaction" here is the disposal arrangement, the second of the " 'two discrete, identifiable classes of economic activity': waste collection and disposal," in which the Court below found the Town to be participating. (*Smithtown*, SSC Petition at 27a, citing *White*, 460 U.S. at 211 n.7, 103 S. Ct. at 1046 n.7).

Whether the disposal transaction is considered to be between the Town and its residents through the tax bill, or between the Town and Ogden through the Huntington agreement, or between the Town and SSC through the Improvement Contract, the purchase of disposal service was directly made by the Town. There is no "downstream" transaction over which the Town exerts its influence because there is no transaction to which the Town is not a party. The essential fact here is that SSC has no real disposal obligation at all, merely the obligation to collect and deliver waste under the terms of its Contract.

As noted above, it is a misstatement of fact by SSC to claim that the tipping fee paid by SSC was "imposed by" the Town's incinerator operator, with the implication that SSC was forced to pay that entity, or that, but for the Contract, it otherwise would have had some right to make its own choice as to disposal services. As the Court of Appeals noted (*Smithtown*, SSC Petition at 28a-29a), the disposal fee "pass-through" mechanism in the Contract was designed to assist the Town in monitoring SSC's performance —particularly to discourage the disposal of non-Improvement waste under cover of the Contract — not as a conveyance of any right to shop for disposal sites.

SSC's position with regard to disposal of waste from the Improvement is analogous to that of a messenger service delivering a package from one municipal office to another, with directions to use a route taking it over a municipal toll bridge. The messenger may be required to pay the toll and be reimbursed by the city, because the city decides where the package is to go. Here, SSC is required to collect and deliver waste, pay the Town its fee and be reimbursed, because the Town, having established the Improvement, decides where the waste is to go.

Moreover, there is no basis for SSC's claims that interstate sellers of disposal services are denied access to waste generated in Smithtown. The interstate market is unimpaired. The services of interstate sellers are still sought, only it is the Town, not the private hauler, who is the buyer.[4] As this Court has explained on several occasions, the fact that an opportunity may be denied to a particular firm by government action does not establish a violation of the Commerce Clause.

> We cannot, however, accept appellants' underlying notion that the Commerce Clause protects the particular structure or methods of operation in a retail market. As indicated by the Court in *Hughes [v. Alexandria Scrap,* 426 U.S. 794, 96 S. Ct. 2488 (1976)] the clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations.

Exxon Corporation v. Governor of Maryland, 437 U.S. 117, 127, 98 S. Ct. 2207, 2215 (1978). *See also Southern Pacific Co. v. Arizona,* 325 U.S. 761, 65 S. Ct. 1515 (1945); *Kassel v. Consolidated Freightways Corp.,* 450 U.S. 662, 101 S. Ct. 1309 (1981); *Kleenwell Biohazard Waste v. Nelson,* 48 F.3d 391 (9th Cir. 1995), *cert. denied,* 115 S. Ct. 2580 (1995).

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4. Ogden Martin Systems, Inc., the operator of the Huntington incinerator is a Delaware corporation. Their services were secured by Huntington as a result of a nationwide procurement. In addition, Smithtown's recyclables are marketed to a variety of buyers across the United States and Canada.

III.

THERE IS NO CONFLICT WITH THE ELEVENTH CIRCUIT WARRANTING REVIEW OF THE DECISION BELOW.

Waste Recycling, Inc. v. Southeast Alabama Solid Waste Disposal Authority, 814 F. Supp. 1566 (M.D. Ala. 1993), *aff'd without op. sub. nom. Waste Recycling, Inc. v. Southeast Alabama Solid Waste Disposal Authority*, 29 F.3d 641 (11th Cir. 1994) is cited by Petitioner as in conflict with the decision of the Second Circuit below. This is not so for the simple reason that the Eleventh Circuit Court of Appeals did not write an opinion; it merely affirmed the result reached by the District Court and did not necessarily adopt the lower court's reasoning. *Sporhase*, 458 U.S. at 949, 102 S. Ct. at 3460.

The Court of Appeals' reference to *Waste Recycling* (Petition at 29a), states only that, "We decline to adopt the reasoning of the *Waste Recycling* court." Since the Eleventh Circuit's reasoning is unexpressed, the reference can only be to the District Court's decision. Yet even accepting the precedential value ascribed by the Petitioner to the Eleventh Circuit's affirmance in *Waste Recycling*, this does not necessarily constitute a conflict in the decisions of two United States Circuit Courts of Appeals as the nature of the conflict portrayed by Petitioner (at 23-25) is simply inaccurate.

The *Waste Recycling* plaintiffs were waste haulers subject to local ordinances, not municipal service contracts, which required them to deliver waste to facilities to be constructed by a public Authority serving a four-county area. The ordinances, adopted pursuant to contracts each of the three municipal defendants had made with the Authority, were directed at the haulers and carried civil and criminal penalties for violations.

The District Court rejected the market participant defense and held the cities to be regulators, not participants, on the grounds that "The cities would be able to implement such provisions only because of the regulatory powers they possess as sovereigns. These are not the types of measures which private participants in the marketplace could implement." 814 F.Supp at 1573.

It is entirely likely that the Second Circuit would have come to the same conclusion with respect to the question of participation versus regulation and on the same grounds. This is precisely the result which the Court below reached with respect to Smithtown's ordinance. "A state's actions constitute 'market participation' only if a private party could have engaged in the same actions." (*Smithtown*, SSC Petition at 22a-23a).

The Second Circuit found market participation by Smithtown on facts not before the *Waste Recycling* court — the contractual provision of collection and disposal services in an Improvement district funded by tax dollars. *See Waste Recycling*, 814 F. Supp. at 1583 n.22. There are no criminal penalties which compel SSC to adhere to the terms of its Contract. The Court invalidated those sections of the Smithtown Code which might have been applied against SSC.

Indeed, the only aspect of the decision in *Waste Recycling* which the Second Circuit declined to adopt dealt with alternative grounds (profit motive and ownership) to reject market participant status for one of the Alabama ordinances. *See* Petition at 29a-30a; *Waste Recycling*, 814 F. Supp. 1575-1576. Given the differences in the fact situations presented to the two Courts, coupled with their concurrence in reasoning on the dispositive issues, it cannot fairly be said that the two Circuit Courts are in conflict on the same important matter.

CONCLUSION

This Court should deny the writ as to all issues raised in the Petition.

Respectfully submitted,

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